87-1632

No.

Supreme Court, U.S.
FILED
MAR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

YONKERS BOARD OF EDUCATION
Petitioner

v.

UNITED STATES OF AMERICA AND
YONKERS BRANCH-NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED

I.

Where The Placement Of Subsidized Housing In One Section Of A Municipality Has A Residual Impact On The Racial Composition Of Schools, And Where The School Board Has Not Participated In The Placement Of Such Housing, May Such A School Board Be Held Liable For School Segregation For Not Taking Action To Overcome The Segregative Effects Of Such Housing Patterns?

II.

Where A School Board Has Neither Operated A Dual School System Historically Nor Committed A Significant Number Of Acts Of Intentional Segregation In the Area Of Student Assignments, May the School Board Nonetheless Be Held Liable For School Segregation Because Of Unintended "Disparities" In Educational Opportunity Between Schools With Differing Proportions Of Majority And Minority Students?

III.

Whether In Determining The Existence Of "Segregated" Schools In a Multi-Ethnic School System, It Is Appropriate To Group Hispanics And Blacks As A Single Category Of "Minorities," And To Count Asians or Other Minority Groups As "Whites," In the Absence Of Any Evidence Of School Board Discrimination Against Either Hispanics Or Asians?

LIST OF PARTIES

Petitioner

Yonkers Board of Education

Respondents

United States of America

Yonkers Branch - National Association for the Advancement of Colored People (NAACP) and Regina Ryer, a minor by her next friend, Charlotte Ryer

Other Parties Below

City of Yonkers and Yonkers Community Development Agency, Defendants

United States Department of Housing and Urban Development, Defendant -Third Party Defendant; (dismissed at the conclusion of the liability trial, *see* App. at 9a, n.1).

Yonkers Federation of Teachers, Defendant-Intervenor (intervened prior to and participated in the school remedy hearing)

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IN THE
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OCTOBER TERM, 1987

No.

YONKERS BOARD OF EDUCATION,
Petitioner,

v.

UNITED STATES OF AMERICA and
YONKERS BRANCH - NAACP,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner Yonkers Board of Education respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit entered in this case on December 28, 1987.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals for the Second Circuit, not as yet reported, is printed in Volume Two of the Appendix.

The memorandum opinion of the United States District Court for the Southern District of New York holding Petitioner liable for intentional segregation of its public schools is reported at 624 F. Supp. 1276 (S.D.N.Y. 1985) and is reprinted in Volume One of the Appendix.

The remedial orders of the United States District Court for the Southern District of New York are reported at 635 F. Supp. 1538 (S.D.N.Y. 1986) (school remedy order) and at 635 F. Supp. 1577 (S.D.N.Y. 1986) (housing remedy order). Both remedial orders are reprinted in Volume Two of the Appendix.

The memorandum opinion of the District Court denying Petitioner's motion to sever the claims of housing discrimination from the claims of school segregation and granting Respondent NAACP's motion to intervene is reported at 518 F. Supp. 191 (S.D.N.Y. 1981).

The memorandum opinion of the District Court denying Petitioner's motion to dismiss for lack of subject matter jurisdiction the Title IV and Title VI claims raised by Respondent United States of America is an unpublished decision and is referenced in the District Court's memorandum opinion. *See* App. at 476a.

JURISDICTION

The judgment of the Court of Appeals for the Second Circuit was entered on December 28, 1987. This Petition For Writ of Certiorari was filed within 90 days of the date of that judgment. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Constitutional and statutory provisions involved in this case are: the Fourteenth Amendment, Section 1, to the United States Constitution; 42 U.S.C. §1983; 42 U.S.C. §2000c-6 of Title IV of the Civil Rights Act of 1964, 42 U.S.C. §2000c *et seq.;* and 42 U.S.C. §2000d of Title VI of the Civil Rights Act of 1964, 42 U.S.C. §2000d *et seq.* The full text of these provisions is printed in Volume Two of the Appendix.

STATEMENT OF THE CASE

This is an unprecedented case combining claims of school segregation and housing discrimination against separate and legally-independent governmental entities. The District Court expressly stated that it is "different from the typical school

desegregation case" because of the issue of whether housing discrimination by a municipality "is relevant to the determination of liability for school segregation" on the part of a school board. *United States* v. *Yonkers Board of Education,* 624 F. Supp. 1276, 1376-77 (S.D.N.Y. 1985); Appendix at 188a.[1] No such case, according to the District Court, "has ever previously been brought." App. at 484a.

The District Court held that housing discrimination is relevant and found the school board liable for systemwide school segregation. The Court of Appeals, noting the uniqueness of this action "in its conjoined attack on the actions of state and municipal officials with respect to segregation in both schools and housing," affirmed the District Court "in all respects." *United States* v. *Yonkers Board of Education,* ___ F.2d ___ (2nd Cir. 1987); App. at 577a, 583a.

Petitioner, the Yonkers Board of Education, operates a multi-ethnic school district, the fourth largest public school system in the State of New York. The school district shares the same geographical boundaries with the City of Yonkers. In 1980-81, the year this action was filed, the public school population was 21,863: 62% white; 21% black; 16% hispanic; 2% asian and other minority. *See* App. at 201a.

By statute, Petitioner is an independent state agency subject to the control of the New York State Board of Regents and the Regents' Commissioner of Education. It is an agent of the state, not the City of Yonkers, and has by statute "entire and exclusive charge and control" of the Yonkers public schools. N.Y. Const. Art. 5, §4; N.Y. Educ. Law, § 2554.

The Board of Education consists of nine trustees. Under state law, trustees are appointed by the mayor of the City of Yonkers for staggered five-year terms. The City Council neither advises nor consents to the appointment, and the authority of the

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[1]All further references to the District Court liability opinion are to the Appendix.

mayor ends with the appointment. The mayor has neither the power to remove nor the power to review the actions of trustees. N.Y. Educ. Law, § 2553(3). The trustees are accountable solely to the State Commissioner of Education.

On December 1, 1980, the United States filed suit against the City of Yonkers and the Yonkers Community Development Agency, alleging that the City and CDA had "followed a systematic pattern of selecting sites for public and subsidized housing projects" that had both perpetuated and aggravated residential racial segregation in the City of Yonkers. In addition, the United States alleged that the City's selection of 36 sites for 6,644 units of public and subsidized housing in southwest Yonkers had "seriously aggravated racial segregation" in the public schools as well. App. at 12a-13a. The government also joined claims against Petitioner, alleging that by various practices the school board had segregated students by race in violation, *inter alia,* of Titles IV and VI of the Civil Rights Act of 1964 and the Fourteenth Amendment. The government did not allege that Petitioner had any involvement in the City's site selection practices.

On January 27, 1981, Petitioner, citing *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1, 23 (1971), moved to sever the government's housing claims from the school claims on the ground that "the Board of Education has no authority over any aspect of public housing" and was helpless to remedy the effects of the alleged housing discrimination. The District Court denied the motion. *United States* v. *Yonkers Board of Education,* 518 F. Supp. 191, 194-197 (S.D.N.Y. 1981).

On March 4, 1981, the Yonkers Branch of the National Association for the Advancement of Colored People and a named student by her mother as next friend moved to intervene as parties plaintiffs in light of public comments by the Justice Department that it was considering dismissing the case. The District Court granted the motion to intervene, *id.* at 201-03, and certified the case as a class action on behalf of all black residents of Yonkers who were residents of or eligible for publicly-assisted housing in

Yonkers or were parents of students attending public school in Yonkers.

With the District Court's denial of Petitioner's motion to sever, the litigation proceeded and was tried as a combined school and housing segregation case — the first of its kind. *See* App. at 484a. Trial, which took 89 days, began on August 2, 1983 and ended on September 19, 1984.

On November 20, 1985, fourteen months later, the District Court issued its liability opinion. In that opinion, the District Court first determined the City's liability for its housing practices. It held that the City's placement of subsidized housing in southwest Yonkers, to the exclusion of other sections of the City, constituted a pattern and practice of racial discrimination by city officials. *See* App. at 182a.

After finding the City liable for its public housing practices, the Court addressed the liability of the school authorities. The threshold issue was the definition of "segregation" in a school system which is multi-ethnic. The answer was crucially dependent on the statistical treatment which the District Court accorded black and hispanic students. Although the greatest numbers of black and hispanic students were in schools in southwest Yonkers, many of these schools had relatively even distributions of white, black and hispanic students. Such schools were thus relatively "balanced" if the three racial/ethnic categories were considered as distinct groups; they were "racially" imbalanced, however, or "segregated," if blacks and hispanics were simply grouped statistically as a single category of "minority," thus rendering such schools "predominantly minority" for purposes of analysis. Although no evidence at trial was introduced of intentional discrimination against hispanics by school officials, the District Court combined hispanics and blacks to conclude that the schools were "segregated." By contrast, the Court treated asians and other minority groups, most of whom attended predominantly white schools, as "white." App. at 191a-92a; 201a, ns. 83, 84.

Even using this statistical analysis, the District Court expressly determined that Petitioner (a) had *not* failed to fulfill an obligation to dismantle a dual school system, and (b) had *not* "engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation in the area of student assignments . . . ." App. at 491a-92a. The Court also expressly found that "disparities" in the quality of various school facilities, and other measures of educational "opportunity" affecting certain predominantly minority schools, were "*not* created by discriminatory allocation of funds or other resources" and that a number of the "disparities existed well before the presence of significant numbers of minorities in the city." App. at 492a (emphasis added).

Despite these express findings, however, the District Court held that, as a matter of law, its contemporaneous determination of housing discrimination against the City of Yonkers was relevant to its determination of Petitioner's liability for school segregation, given the "segregative impact" of the placement of public and subsidized housing on the racial composition of the schools and Petitioner's "failure to implement any significant desegregative school reforms" to alleviate the impact of such housing patterns. App. at 500a. The Court similarly held that Petitioner's failure to reorganize its schools to alleviate racial imbalance caused by housing patterns was relevant to the liability determination because the absence of such a desegregative plan resulted in the "perpetuation" of "educational inequalities" among the district's schools. App. at 493a.

Based primarily on the segregative impact of the City's housing practices on the schools, the Court held the City liable for school segregation as well. App. at 522a. Following remedial hearings, the Court on May 13, 1986 ordered the desegregation of the entire school system. App. at 533a. The Court subsequently entered a housing remedial order requiring the development of 200 units of public housing in east Yonkers and submission of a plan for the development of additional subsidized housing "in

existing residential areas in east or northwest Yonkers." App. at 562a.

The Court of Appeals concluded that the District Court "properly applied the appropriate legal principles" and affirmed the opinion and orders against both defendants "in all respects." App. at 583a.

The decision below thus stands for the proposition that where racial imbalance in public schools is caused, in significant part, by discriminatory housing practices, school authorities may be held liable for systemwide segregation for failing to take action to rectify the results of such practices. In an entirely novel fashion, the Court below has also held that given the continuing existence of unintended educational "disparities" in racially/ethnically mixed schools, the failure to adopt a desegregation plan is an unconstitutional denial of equal educational opportunity. This unprecedented decision has staggering implications for the management of the affairs of public school systems throughout the nation.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Placing Liability On School Authorities For The Residual Effects of Discriminatory Housing Practices Presents An Issue Of Imperative Public Importance As To Which There Is A Conflict In The Circuits

This case, as the District Court squarely acknowledged, "is not simply another in a long line of school desegregation cases." App. at 484a. It is unique because a legally autonomous school board has been placed under judicial supervision because it did not adopt a racial balance plan to alleviate the segregative impact of public housing discrimination and ameliorate unintended educational "disparities," despite *explicit* findings that the school board itself was not operating a dual school system; had not "engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation

in the area of student assignments . . .," App. at 492a; and was not responsible for decisions affecting the placement of the public housing. *See, e.g.,* App. at 181a-82a, 495a, 513a, 514a-15a. In the face of such findings, the District Court's conclusion, as affirmed by the Court of Appeals, that the Petitioner "is liable for the racial segregation of Yonkers public schools," App. at 506a, is without support in any of this Court's previous school cases. *See Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971); *Bradley* v. *Milliken,* 418 U.S. 717 (1974).

A. School Authorities Should Not Be Held Responsible For The Effects Of Discriminatory Housing Patterns

Despite findings that in some discrete areas Petitioner had committed isolated acts of intentional segregation or discrimination,[2] the District Court itself made clear that, after a searching

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[2]These highly questionable findings, some of which the Court itself admitted were "difficult" and presented a "fine line," *see* App. at 335a, 338a, involved no direct evidence whatever of discriminatory intent and related primarily to:

—the placement of a few black students (approximately 0-5 in 1975-76, approximately 27-37 in 1979-80) in special education classes in predominantly white schools, a practice which the Court concluded was "stigmatizing" and "discriminatory," but *not* "segregative"; *see* App. at 354a-55a, 488a.

—the "disproportionately" low enrollment of blacks (but not hispanics) at a single vocational high school (Saunders), where "no evidence was presented . . . that school officials established entrance requirements at Saunders in order to exclude minorities from school" and "no evidence exists of any minority student being denied admission at Saunders in part because of their race;" App. at 335a.

—the uneven distribution of black faculty among the various schools, where the Court itself conceded (a) that "the mathematical extent" of such imbalance in black staff assignments "was not overwhelming" and (b) Petitioner's "practical difficulties" in unsuccessfully renegotiating its collective bargaining agreement with the teachers' union to override a seniority clause which constrained Petitioner from making staff assignments at random; *see* App. at 487a, 365a; and where "segregative" staff assignments do not, in any event, establish a *prima facie* case of intentional segregation of *students. See Dayton Board of Education* v. *Brinkman,* 443 U.S. 526 at 536, n. 9 (1979);

Footnote continued on next page

review of the evidence, it was unable to conclude that Petitioner, by its own acts, had significantly caused or enhanced racial segregation in its schools. Rather, as the Court explicitly stated:

> The Board has not failed to fulfill an obligation to dismantle a dual school system; nor has it engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation in the area of student assignments, particularly on the elementary school level.
>
> * * *
>
> In the instant case, the record contains substantially less (or no) evidence of many of the classic segregative student assignment techniques — optional or non-contiguous attendance zones; segregative out-of-district transfer policies; a pattern of segregative school openings, closings, or racial gerrymandering of attendance lines. . . .

App. at 491a-92a, 497a.

Thus, under the District Court's theory, the factor of "primary significance" in its determination of Petitioner's liability for school segregation "is the fact that the *City* has been found liable,

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> —three isolated attendance line changes after 1954 involving 47 students, where, paradoxically, students of *both* races were reassigned (81% white, 19% black), *see* App. at 289a, and the failure to close a racially imbalanced junior high school, where the school's predominantly black enrollment pattern was originally caused by increasing minority population in the school's attendance area and a decline in white enrollment at the same period. *See* App. at 278a-79a.

As the Court's discussion of the legal significance of the housing and educational "disparities" claims makes clear, none of these erroneous findings against Petitioner was, in any event, sufficient independently or cumulatively to hold Petitioner liable for systemwide segregation, and the District Court did not purport to do so. *See* App. at 491a-92a. [Note: Petitioner reserves the right to argue the erroneousness of these and other subsidiary findings, including the taking of school property to remedy the City's housing violations, if certiorari is granted, but does not include these discrete issues as among the reasons for the granting of certiorari.]

under relevant legal standards, for intentionally maintaining and exacerbating racial segregation in Yonkers," since the City's public housing policies have had a "segregative impact" on the schools. App. at 499a (emphasis added). In the District Court's view, the impact of this form of "state action" by a separate agency rendered the Petitioner liable for continuing to maintain its traditional neighborhood school policy of student assignments rather than taking some form of compensatory "desegregative" action. App. at 499a. This view of "state action," as one commentator has noted,

> allowed the court [in the *Yonkers* case] not only to find the city responsible for school segregation based in large part upon its segregative housing practices, but also to impose liability upon the *school board* for its failure to take desegregative action to overcome the effects of the city's segregative housing practices, an approach that has been generally eschewed by the courts.[3]

Indeed, in *Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* this Court expressed serious reservations about precisely this approach. While the Court under the facts presented left open the question of "whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree," the Court stated:

> One vehicle can carry only a limited amount of baggage. It would not serve the important objective of *Brown I* to seek to use school desegregation cases for purposes beyond their scope, although desegregation of schools ultimately will have impact on other forms of discrimination . . . . Our objective in dealing with these cases is to see that *school authorities* exclude no pupil of a racial minority from any school,

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[3]Days, Book Review, 95 Yale L.J. 1737, 1767 (1986) (Emphasis in original). Drew S. Days III, then Assistant Attorney General, signed the original complaint in this litigation for the United States.

> directly or indirectly, on account of race; it does not and cannot embrace all the problems of racial prejudice, *even when those problems contribute to disproportionate racial concentrations in some schools.*

402 U.S. at 22-23 (emphasis added).

Five years after *Swann,* three Justices in *Austin Independent School District* v. *United States,* 429 U.S. 990 (1976), expressed the same misgivings. In *Austin,* Justice Powell concurring, joined by Justices Burger and Reinquest, wrote:

> The principal cause of racial and ethnic imbalance in urban public schools across the country — north and south — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, *discrimination in housing — whether public or private — cannot be attributed to school authorities.*

429 U.S. at 994 (emphasis added).

Thus, while a majority of this Court has not definitively resolved this issue, several Justices have clearly expressed in principle considerable reservations about the wisdom of holding school authorities liable for the discriminatory housing policies of others. The approach adopted by the courts below in this case, where Petitioner had no role in or control over the housing policies of the City of Yonkers, erroneously disregards these reservations in imposing liability on Petitioner. The result is to place on school authorities an unwarranted and wholly impractical obligation to monitor and review on an ongoing basis the practices of other agencies, to inquire into the motivation for and ultimately the constitutionality of such practices, to assess the effects of such practices on the racial composition of the schools, and, finally, to determine whether a course of "corrective" action in student assignment policy is required.

Neither the District Court nor the Court of Appeals gave any consideration to the disabling limitations of this approach. Wholly unanswered, for example, is how a legally independent school

board would, as a practical matter, ever be able to reach an informed judgment that the segregative impact of a municipality's housing patterns is, in fact, the product of *intentional* discrimination, such that the board's neighborhood school policy could no longer be regarded (in the District Court's analysis) as "race-neutral." See App. at 499a.

The voluminous record in this case clearly illustrates the problem. The public housing practices of the City of Yonkers as reviewed by the District Court relate to innumerable sites, actual and considered, cover a period of thirty years, and implicated HUD's role and responsiblity. The Court's finding that the City's policies constitute *intentional* discrimination followed "nearly 100 days of trial during which 84 witnesses testified and 38 depositions, as well as thousands of exhibits, were received in evidence . . . ." App. at 7a. The District Court itself required an additional fourteen months to arrive at its decision — a decision which the City then appealed to the Second Circuit.

The distinction between discriminatory *intent,* which is unconstitutional, and *effect,* which is not, is one of the most subtle and difficult in the law, and one that "demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.,* 429 U.S. 252 at 266 (1977). The District Court itself noted that its inquiry involved the review of actions of city officials who "were entirely well-meaning public servants acting in accordance with their perception of what was . . . in the best interests of the community." App. at 9a-10a. Indeed, even the underlying issue of *whether* the City's housing practices had adversely affected the racial composition of the schools in any measurable way was the subject of sharp disagreement among acknowledged experts. *See* App. at 434a-36a. Clearly, no school board has the resources or the ability to engage in such a review and inquiry.

Moreover, no school board has the "competence" or the authority to make findings regarding discriminatory violations by other institutions as a predicate to formulating race-conscious

remedial relief. *See Regents of University of California* v. *Bakke*, 438 U.S. 265, 309 (1978) (regents of university medical school not competent to adjudicate "particular claims of illegality" as justification for adoption of race-conscious measures in admissions policies.). As Justice O'Connor, concurring, stated in *Wygant* v. *Jackson Board of Education*, 476 U.S. 267, 288 (1986):

> . . . a governmental agency's interest in remedying 'societal' discrimination, that is, *discrimination not traceable to its own actions*, cannot be deemed sufficiently compelling to pass constitutional muster under strict scrutiny.

(Emphasis added.)

The problems which the public schools in large urban areas confront today are urgent and massive. To add to that agenda responsibility for assessing and untangling the legal ramifications of the placement of public housing with regard to student assignment policies is a mistake of serious proportions. "One vehicle can carry only a limited amount of baggage." *Swann, supra*, 402 U.S. at 23.

B. The Decision Below Conflicts With Decisions Of Other Courts of Appeal

In imposing liability on Petitioner for the segregative impact of public housing discrimination, the decision of the courts below is in conflict in principle, as earlier shown, with this Court's cautionary language in *Swann* and *Austin* against using school desegregation cases "to achieve broader purposes lying beyond the jurisdiction of school authorities," *Swann, supra*, 402 U.S. at 22. This conflict the District Court candidly recognized. App. at 496a-99a; 512a-13a.

Moreover, the decision below is flatly in conflict with a series of cases from other circuits. The Sixth Circuit has consistently rejected the argument that school boards may be held liable for discriminatory housing practices of other units of government which result in racial imbalance in the schools. In *Bell* v. *Board of*

Education, Akron Public Schools, 638 F.2d 963, 968 (6th Cir. 1982), the Court stated:

> We do not find any case addressing the argument that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies. We decline to accept this argument. Under this argument the discriminatory conduct of the FHA in making housing loans and local housing authorities in the construction and rental of public housing is attributable to school boards. *Such a proposal places too heavy a burden on the schools to remedy wrongs for which they are no more or less responsible than the plaintiffs, the courts, the churches, the Congress or other institutions.* Plaintiffs do not suggest how the schools, after a finding of liability, would go about remedying this problem or what kind of order a federal court could enter that might as a practical matter have a chance of changing the fact that black and white families live in separate neighborhoods in most towns and cities.

(Emphasis added.)

The concurring opinion in *Bell* is to the same effect:

> I also agree with Judge Merritt's opinion to the effect that intentionally segregative housing actions by other governmental entities, even if proved, cannot be the basis of ordering the Board of Education of Akron to attempt to remedy the results thereof in the schools. In addition to the statement of Justice Powell upon the grant of *certiorari* in *Austin Independent School District* v. *United States,* 492 U.S. 990, 97 S.Ct. 517, 50 L.Ed. 2d 603 (1976) . . . this court . . . said:
>
> > . . . the critical fact determination in an action charging a school board with violation of the rights of minority pupils is whether an existing racial imbalance is intentionally caused by discriminatory practices of the Board. A statistical imbalance standing alone is not enough; official discrimination is required to invoke the

> protection of the Fourteenth Amendment. *On this basis we upheld the exclusion by the district court of evidence of alleged discrimination in the public and private housing market of Cincinnati — acts over which the school board had no control.*

683 F.2d 963 at 970 (emphasis in original).

See also Bronson v. *Board of Education of the City School District of Cincinnati,* 578 F.Supp. 1091, 1104-05 (S.D. Ohio 1984) ("It is well settled that absent a showing of a nexus between the conduct of any of the named [school] Defendants and the acts of housing authorities or other governmental or private actors or agencies responsible for shaping . . . residential patterns . . ., these named defendants herein *cannot* be held liable for, or be responsible for remedying, any racial imbalance that may be attributable to the practices and policies of the independent actors and agencies.") (emphasis in original); *Higgins* v. *Board of Education of Grand Rapids,* 508 F.2d 779, 788-89 (6th Cir. 1974) ("... discrimination by other than school authorities cannot be relied upon as the sole basis for showing a violation by the school board."); *Deal* v. *Cincinnati Board of Education,* 419 F.2d 1387, 1391-92 (6th Cir. 1969) ("Appellants contend that housing patterns in Cincinnati are segregated as a result of both public and private agencies, and that the School Board 'may not close its eyes to this reality' but should remedy it. We are not told how or by what lawful authority the School Board can remedy the housing patterns of a neighborhood. . . . We find no basis to enter any such order."); *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55, 60, n. 4 (6th Cir. 1966) (affirming exclusion of evidence in school desegregation case of alleged housing discrimination; relief for proven public housing discrimination properly obtainable from housing, not school officials).

Although it has not specifically decided the issue, the Fourth Circuit has recently indicated that it would also adopt the rule that school boards are not liable for housing discrimination. *Goldsboro City Board of Education* v. *Wayne County Board of Education,* 745 F.2d 324, 331-332, n. 15 (4th Cir. 1984):

> [O]ther courts have held that school boards are not responsible for the decisions of other public agencies arrived at without encouragement or contrivance from the school boards. [Citations omitted.] Judge Craven's statement in *Bradley* v. *School Board*, 462 F.2d at 1066, indicates that we would follow the Sixth Circuit and say that the school board is not responsible for the housing decisions made by other governmental actors ("That there has been housing discrimination . . . is deplorable, but a school case, like a vehicle, can carry only a limited amount of baggage.") However, we need not and do not resolve the issue in the present case.

See also Bradley v. *School Board of the City of Richmond, Virginia*, 462 F.2d 1058, 1066 (4th Cir. 1972).

Taken together, these cases stand for two propositions: that school boards may not and should not be held liable for housing discrimination over which they have no control; and that the proper remedy for proven housing discrimination should be placed where it belongs — on those directly responsible. The District Court attempted to distinguish these cases by stating that the essential issue is whether "some meaningful connection exists between the policies of public housing officials and the policies of school board officials." App. at 498a. In proceeding, however, to hold the Board liable for school segregation, the Court simply accorded "primary significance," App. at 499a, to the previously determined liability of the City for intentional housing discrimination — the very factor for which a majority of other courts have held school boards *not* responsible.

At bottom, the District Court's analysis, as affirmed by the Court of Appeals, is that the existence of discriminatory housing patterns which affect the racial composition of schools — as decided *contemporaneously* with its analysis of the School Board's liability for maintaining a neighborhood school policy — is a factor which fatally taints such a system of student assignments. Under this analysis, a historically-rooted neighborhood school system can no longer be considered "race-neutral" and is thus constitutionally unacceptable. App. at 499a.

This unprecedented decision — candidly recognized as such by the District Court — and its surpassing public importance warrants immediate review by this Court, not only in the interests of nearly 200,000 citizens of Yonkers but as a guide to the future actions of similarly situated school boards in all parts of the country.

II. Judicial Interposition In The Operation Of The Public Schools Because Of The Presence Of Educational "Disparities," In The Absence Of Either Intentionally Segregative Student Assignments Or A Discriminatory Allocation Of Funds And Resources, Is Contrary To Traditional Principles Of Judicial Restraint

In this case, the placement of public housing and its effects on the schools of southwest Yonkers was part of a larger complex of intractable educational and social problems which Petitioner has struggled to address and overcome since at least the late 1960's. At its core, the question is how to improve and "equalize" educational opportunity where a number of schools are in inner-city areas, are surrounded by housing projects and other conditions of social and economic decay, and are attended by large numbers of minority students from disadvantaged backgrounds.

Not satisfied that Petitioner, despite measurable efforts to ameliorate these problems, had wholly succeeded in "equalizing" educational opportunity in all of its aspects within predominantly minority schools, the District Court held that Petitioner's failure to adopt a "comprehensive desegregative" plan constitutes a deliberate "perpetuation of inequalities in educational opportunity" so as to render it "liable for racial segregation of Yonkers public schools." App. at 493a, 505a. In the absence, however, of predicate findings that Petitioner was operating a *de jure* segregated system, the judiciary has no basis for intruding in this fashion into the educational process. As this Court stated in *Swann*:

> School authorities are traditionally charged with broad power to formulate and implement educational policy and might well conclude, for example, that in order to prepare students to live in a pluralistic society each school should have a prescribed ratio of Negro to white students reflecting the proportion for the district as a whole. To do this as an educational policy is within the broad discretionary powers of school authorities; *absent a finding of a constitutional violation, however, that would not be within the authority of a federal court.*

402 U.S. 1, at 16 (emphasis added). *See also Washington* v. *Seattie School District No. 1,* 458 U.S. 457, 479-80 (1982) (question "whether to provide an integrated learning environment rather than a system of neighborhood schools" ordinarily one of school board discretion).

The "tangible inequalities in the quality of education" to which the District Court refers, *see* App. at 494a, are familiar to virtually every urban school system. Older school facilities, smaller playgrounds, disciplinary problems, lower teacher expectations, and higher ratios of teacher and student turnover are not conditions unique to inner-city, predominantly minority schools in Yonkers alone. But judicial authority, as this Court has observed in a different context, "intervenes only when local authority defaults." *Swann, supra,* 402 U.S. at 16.

Local school authority did not default in this case. Indeed, the District Court's *own* findings directly reflect Petitioner's determined and often successful efforts to equalize educational opportunity. Compensatory education programs were targeted for the inner-city schools in southwest Yonkers and introduced on a massive scale. Intensive reading programs were initiated. Teacher-student ratios were reduced. Individualized instruction was provided. Special resources teachers were added. Extra resources and supplies were furnished. *See generally,* App. at 311a-12a. By the end of the tumultuous 1970's Petitioner's educational initiatives had successfully overcome a number of the earlier "disparities." *Id.*

Moreover, the District Court's quite specific findings concerning the causes of "unequal" educational opportunity wholly fail to support its ultimate legal conclusion of liability. The existence of "educational disparities" in the quality of school facilities, student enrollment and turnover, and other measures of educational opportunity were *not*, as the Court expressly found, "created by discriminatory allocation of funds or resources." App. at 492a. In sum, perceived differences in the quality of education between racially imbalanced schools were purely adventitious:

> The record supports the conclusion that the Board did not deliberately fail, for partly racial reasons, either to provide remedial or other special instructions programs or to fairly allocate its programmatic resources among the district's white and minority schools.

App. at 313a.

These crucial findings of non-discrimination by school authorities should have brought the District Court's inquiry to an end. Yet lacking any evidence of either significant acts of intentional segregation by Petitioner in the area of student assignments *or* of a discriminatory allocation of funds and resources, the Court as a fallback attempted to equate the very concept of racial/ethnic imbalance with unequal educational opportunity. Thus:

> The relative inequality in educational opportunities available at southwest Yonkers predominantly minority schools has contributed to the identification of minority schools in Yonkers as educationally inferior schools, with the two characteristics becoming virtually inseparable. *This confluence of racial identifiability and relative educational opportunity has served to reinforce the segregative demographic patterns which have evolved in the city.*

App. at 319a (emphasis added).

Under this analysis, the Court concluded that Petitioner should have corrected conditions of racial and ethnic imbalance

to improve educational opportunity as a relative matter and that its failure to do so "resulted in the perpetuation of the remaining educational inequalities in the district's schools." App. at 493a. Thus, Petitioner's failure to adopt a racial balance plan — presumably one of sweeping dimensions if conditions of racial imbalance were to be eliminated — is central to the Court's liability determination. There is no warrant in this Court's cases for such an approach. *See Washington* v. *Seattle School District, supra,* 458 U.S. at 479-80; *Swann, supra,* 402 U.S. 1 at 16.

Finally, the District Court's conclusion that Petitioner was responsible for "perpetuating" educational inequalities by failing to adopt a desegregation plan represents a contradiction in terms. Desegregation will not enlarge the size of playgrounds at inner city schools, reduce the age of the buildings, diminish the mobility rates of low income families, or change the scope of curricular offerings. *See* App. at 492a. "Disparities" of this kind are not related to segregation *per se*; they could as easily exist in a fully integrated school system.

Education, perhaps even more than welfare assistance, presents a myriad of "intractable economic, social, and even philosophical problems." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1, 42 (1973) (quoting *Dandridge* v. *Williams,* 397 U.S. at 487). That some "disparities" remain, despite, as here, the best efforts of school authorities, is not a justification for judicial intervention into the educational policy-making process of local authority. Indeed, "in view of the infinite variables affecting the educational process [no] system [can] assure equal quality of education except in the most relative sense." 411 U.S. at 24.

III. In Determining The Existence Of "Segregated" Schools In A Multi-Ethnic School System, It Is Inappropriate To Group Hispanics And Blacks As A Single Category Of "Minorities," While Counting Asians Or Other Minority Groups As "Whites," In The Absence Of Evidence Of Discrimination By School Authorities Against Either Hispanics Or Asians

In *Keyes* v. *School District No. 1,* 413 U.S. 189, 196 (1973), the Court noted that "[w]hat is or is not a segregated school will necessarily depend on the facts of each particular case." Yonkers is not a bi-racial community; it is multi-ethnic. In such a setting, the crucial determination of whether there are even "segregated" schools *in fact* depends on how school enrollments consisting of differing mixes of racial and ethnic groups are to be analyzed.

Of the twenty-five elementary schools which Petitioner was operating as of the filing of the complaint, only three had enrollments greater than 50 percent black. Similarly, only one of the six middle/junior high schools, and none of five high schools, was more than 50 percent black. *See* App. at 203a-04a; *see also* GX53. Thus, although the school system as a whole was not racially *balanced,* the presence of significant numbers of whites in the great majority of schools attended by large numbers of blacks, together with the attendance of blacks in *every* predominantly white school, precluded a finding that in conventional black/white terms the system as a whole was "segregated." Moreover, if hispanics as a group were viewed as distinct from blacks, enrollment in many of Petitioner's schools reflected almost "ideal" distributions of black, white and hispanic students — Fermi Middle School, for example, was 38 percent white, 25 percent black, 37 percent hispanic in 1980-81. *Ibid.*[4]

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[4]Other examples of schools in 1980-81 which had relatively equal distributions of white, black and hispanic students, but which the District Court found to be "segregated," included: School 9: 37% white, 36% black, 27% hispanic; School 18: 25% white, 35% black, 40% hispanic; School 27: 43% white, 25% black, 32% hispanic; Hawthorne Middle School: 31% white, 29% black, 40%

Footnote continued on next page

The District Court, however, arbitrarily grouped hispanics with blacks as a single "minority" group and thus readily concluded that the school system as a whole was "segregated" since a majority of Petitioner's schools were either predominantly white or predominantly "minority." App. at 191a-92a, 203a. The District Court, moreover, *excluded* asians as a "minority" group altogether, and treated them as "white" for statistical purposes, despite the presence of asians in significant numbers in at least three of the "predominantly white" schools. *See* GX53. As affirmed by the Court of Appeals, this simplistic and reflexive approach to the definition of a "segregated" school system is in conflict with the standard in *Keyes*.

Although the District Court purported to rely on *Keyes* in holding that "blacks and hispanics are to be considered as a group in determining whether the school system is racially segregated," App. at 191a-92a, this Court in *Keyes* made clear that to justify doing so there must first be a sufficient showing that, in comparison with the treatment afforded white students, black and hispanic students have suffered identical discrimination. 413 U.S. at 197-98. Thus, for purposes of defining a "segregated" school in the Denver system, this Court noted an abundance of evidence that in both Denver and the Southwest hispanics and blacks had suffered identical discrimination. "*In that circumstance,* we think [plaintiffs] are entitled to have schools with a combined predominance of Negroes and Hispanos included in the category of 'segregated' schools." 413 U.S. at 198 (emphasis added).

The District Court performed no such analysis in this case. Indeed, neither the Court's opinion nor any aspect of the record reflect *any* evidence at all of discrimination against hispanics within the Yonkers school system. In that circumstance, schools with a combined predominance of blacks and hispanics plainly should not have been treated as "segregated" — a determination

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hispanic; Yonkers High (the most "racially imbalanced" high school): 38% white, 30% black, 32% hispanic. *See* App. at 203a-04a, 461a; *see also* GX53.

which, in this case, has made all the difference. Moreover, neither the opinion nor the record reflects any evidence of discrimination against asians. Asians, too, are an identifiable minority group. *See, e.g., Lau* v. *Nichols,* 414 U.S. 563 (1974). Accordingly, the Court's differing treatment of the two minority groups for statistical analysis — grouping hispanics with blacks, asians with whites — is purely arbitrary and unwarranted.

In the absence of proven discrimination, there is no justification for "combining" these specific minority groups with either blacks or whites — for either "favoring" or "disfavoring" them to reach a desired statistical result. *See Wygant* v. *Jackson Board of Education, supra,* 476 U.S. at 284, n. 13 (lacking findings of "prior, purposeful discrimination against members of each of these minority groups"—blacks, orientals, American Indians, and persons of Spanish descent—school board's preferential treatment of each group held unconstitutional); *See also J.A. Croson Co.* v. *City of Richmond,* 822 F.2d 1355, 1361 (4th Cir. 1987), *cert. granted* ___ U.S. ___ (1988) (similar aggregation of minority groups held not justified given record of past discrimination against blacks only).

Keyes teaches that the question of whether to aggregate other minority groups with blacks in determining the existence of "segregated" schools depends, in each case, on whether the individual school system has historically discriminated against such groups. In the *absence* of such a history of discrimination, as the Sixth Circuit has explicitly held, the *Keyes* test permits hispanic students to be treated in a remedial context "as *white* for desegregation purposes." *Bradley* v. *Milliken,* 620 F.2d 1143, 1156 (6th Cir. 1980) (emphasis added).

If hispanic students in one school system, in the absence of discrimination against them, may be treated as white for the *remedial* purpose of desegregating formerly black schools, then there can be no justification — in the similar absence of discrimination — for aggregating hispanics with blacks in a different school system with the result that schools are deemed "segregated" for liability purposes. The application of the *Keyes* test as

it affects the status of hispanics and other minority groups in school desegregation cases should and must be the same everywhere.

CONCLUSION

The decision of the District Court, affirmed in all respects by the Second Circuit Court of Appeals, constitutes an unprecedented and unwarranted extension of the holdings of this Court. Its impact is national in scope.

Because of the surpassing importance of the issues involved for public education, and to resolve the conflict among the circuits regarding the liability of school authorities for the effects of housing discrimination, a writ of certiorari should be issued.

Respectfully submitted,

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Dated: March 25, 1988

87-1632

Supreme Court, U.S.
FILED
MAR 26 1988

No.

JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

YONKERS BOARD OF EDUCATION
Petitioner

v.

UNITED STATES OF AMERICA AND
YONKERS BRANCH-NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME ONE

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District Court Opinion

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,
Plaintiffs-Intervenors,

80 CIV 6761 (LBS)

-v.-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,
Defendants.

OPINION

November 20, 1985

LEONARD B. SAND, U.S.D.J.

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INTRODUCTION

After nearly one hundred days of trial, during which eighty-four witnesses testified and thirty-eight depositions, as well as thousands of exhibits, were received in evidence, this Court is called upon to decide whether the City of Yonkers and the Yonkers Board of Education have intentionally created or maintained racial segregation in the City's housing and schools. Before embarking on that task, we pause to make clear why that is the issue, and why it falls upon this Court to resolve it.

First, the primary issue in this case is whether the City of Yonkers and the Yonkers Board of Education *intentionally* segregated its housing and schools, since it is clear that by all relevant standards, Yonkers and its public school system are, in fact, racially segregated. The principal question in controversy is whether the segregated condition of the City's housing and schools resulted from the force of circumstances unintended by those who made the decisions which shaped the housing and schools of the community, or whether this condition resulted from an intent to segregate by race.

This Court is called upon to resolve this controversy because the United States Department of Justice has commenced and has maintained, through two administrations, an action alleging that the housing and schools in Yonkers have been intentionally segregated by race, and the Yonkers NAACP has intervened in that action.[1] The action was brought after efforts at conciliation of

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[1]The procedural history of this litigation is set forth below.

On June 24, 1980, the Yonkers Board of Education ("the Board") was notified that the United States Department of Education had determined that the racial segregation of the Yonkers school system was caused by actions and omissions of the Board and the City of Yonkers which violated Titles IV and VI of the Civil Rights Act of 1964, the fourteenth amendment, and contractual assurances made by the Board in consideration of its continuing receipt of federal financial assistance. GX 96.3, 96.4. The Board also was invited to engage in efforts to bring the system into voluntary compliance. GX 96.3. By a letter

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the "schools" portion of this litigation failed but with the assurances (made to Yonkers and to this Court by the plaintiffs and

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dated November 4, 1980, the Department of Education notified the Board that its efforts to obtain adequate voluntary compliance with Title VI had been unsuccessful and that the determination of noncompliance would be referred to the United States Department of Justice unless the Board submitted an acceptable desegregation plan within ten days. GX 96.2. On November 17, 1980, the Department of Education, having determined that voluntary compliance could not be obtained, referred the matter to the Department of Justice. GX 96.1.

On November 24, 1980, the Board filed a complaint seeking to enjoin the United States Departments of Education and Justice from instituting an action against it based on alleged violations of Title VI and seeking an order directing these departments to resume negotiations designed to achieve the Board's voluntary compliance with Title VI. On December 1, 1980, the Board's application for a temporary restraining order and preliminary injunction was denied. *Yonkers Board of Education* v. *United States Department of Education, supra.*

On December 1, 1980, the Attorney General of the United States filed suit against the Board of Education, the City of Yonkers, and the Yonkers Community Development Agency ("the CDA"), alleging that the defendants had engaged in racial discrimination in the administration of the City's public schools and subsidized housing programs. The defendants named in the housing portion of the suit are the City of Yonkers and the CDA (collectively "the City"). The complaint charges that those defendants "have intentionally followed a systematic pattern of selecting sites for public and subsidized housing projects that has effectively perpetuated and seriously aggravated residential racial segregation in the City of Yonkers, in violation of the Constitution, and of Title VIII of the Civil Rights Act of 1968." Complaint, ¶ 24. The defendants named in the school portion of the suit are the Yonkers Board of Education and the City of Yonkers. The complaint charges that the "segregated condition of the public schools operated by the School Board has been caused, in substantial part, by intentional, racially discriminatory actions and omissions" of the Board and the City. Complaint, ¶ 16.

On March 4, 1981, the Yonkers branch of the National Association for the Advancement of Colored People ("NAACP") and Regina Ryer, a minor by her next friend, Charlotte Ryer ("plaintiff-intervenors"), moved to intervene in this suit as party-plaintiffs on behalf of themselves and all others similarly situated. On June 29, 1981, this Court granted Plaintiff-intervenors leave to intervene, *United States* v. *Yonkers Board of Education,* 518 F.Supp. 191, 201-03 (S.D.N.Y. 1981), and subsequently certified the action as a class action on behalf of all black residents of Yonkers who are currently residents of, or eligible to reside in, publicly assisted housing in Yonkers, or who are parents of students currently attending public school in Yonkers.

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the Board of Education) that the initiation of this suit would not end efforts to resolve this controversy consensually.[2] Mindful of the cost which this litigation has entailed,[3] the divisiveness which it has engendered, the need for community support for voluntary remedial action to be successful — in short, the overall desirability of a resolution which originated with the parties themselves — more than the usual efforts at settlement were made. This included appointment of a Special Master, whose sole function was to attempt to bring the parties to a consensual resolution. *See* separate Opinion filed this date. By the closest of margins, the fruits of these efforts, an agreement among the Board of Education, the United States and the NAACP, conditional upon funding by the City Council, was rejected by that body. Hence, all efforts to consensually resolve this matter having failed, the task is ours and we shall proceed to discharge it.

We set forth below, in detail commensurate with the voluminous and complex nature of the record, the findings of fact and conclusions of law which lead to our determination that the plaintiffs have sustained their burden of proving that Yonkers' housing and schools have been intentionally segregated by race. In performing this inquiry, we have examined the actions of many officials who we are certain were entirely well-meaning public servants acting in accordance with their perception of what was feasible in the political and socioeconomic circumstances of

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The City's answering papers asserted a counterclaim against the United States and a third-party complaint against the United States Department of Housing and Urban Development ("HUD"). Plaintiff-intervenors amended their complaint to add a claim against HUD. Plaintiff-intervenors' claim against HUD was settled by a Consent Decree approved by this Court on March 19, 1984. The City's counterclaim and third-party complaint were dismissed on September 18, 1984 on the grounds that they were barred by sovereign immunity and that they failed to state a claim upon which relief could be granted. *United States* v. *Yonkers Board of Education*, 594 F.Supp. 466 (S.D.N.Y. 1984).

[2]*See Yonkers Board of Education* v. *United States Department of Education*, 80 Civ. 6658 (LBS), slip op. at 4-5 (S.D.N.Y. Dec. 1, 1980).

[3]*See* Transcript of Proceedings May 15, 1984, at 13,19.

Yonkers and in the best interests of that community. In many instances, acts were taken by elected officials in response to strong constituent pressures and perceptions of political reality. Members of the Board of Education also acted under similar circumstances. We are not passing moral judgments with respect to the actions of those who steered the destiny of Yonkers; nor do we suggest that the implementation of measures contrary to the political climate of the times would have been an easy task. Our inquiry is whether, under applicable legal standards, actions taken by the City of Yonkers and the Board of Education, with respect to housing and public schools, were in whole or in part intentionally segregative. We find that they were, for the reasons set forth below.

HOUSING

I. BACKGROUND

The City of Yonkers is one of the five largest cities in the State of New York. Its population, according to 1980 census figures, is 195,331. Yonkers is located in Westchester County and is bounded on the west by the Hudson River, on the east by the Bronx River, on the south by the City of New York, and on the north by the Village of Hastings-on-Hudson and the Town of Greenburgh. The City is approximately three to three and one-half miles wide, four to six miles long, and encompasses some eighteen to twenty square miles. It is divided lengthwise by a series of ridges and valleys which run north to south, roughly parallel to the Hudson River. The Saw Mill and Nepperhan Rivers flow through the more western valleys.

Over the course of the nineteenth century, Yonkers evolved from what was primarily a farming village into a significant industrial and commercial center. This development was concentrated in the Southwest section of the City in the areas along and between the Nepperhan, Saw Mill and Hudson Rivers, and along the Hudson River Railroad, which opened in 1849. Factories were built along the rivers, and a central commercial district, known as Getty Square, developed between the factories and along the railroad. From the latter portion of the nineteenth century up to World War II, Getty Square was the hub of commerce for Westchester cities along the Hudson as far north as Peekskill. With the factories, came large amounts of worker housing — generally poor in quality and heavily clustered in the valleys of the Southwest section of the City. The Northwest and East sections of Yonkers remained largely rural until the early 1920s when the Saw Mill River Parkway opened and a pattern of low density suburban housing development began. The pattern continued and accelerated with the construction of the Harlem Division Railroad, the Bronx River Parkway, the New York State Thruway, and the Sprain Brook Parkway — all of which run in a north-

south direction and provide commuters with easy access to New York City.

The three decades following World War II were the time of greatest housing development in Northwest and East Yonkers. Initially, the primary form of development was the single family housing subdivision. Somewhat later, in the 1960s and 1970s, multi-family apartment buildings were built in increasing numbers along the major arterial routes and the commuter rail lines.

As the Northwest and East sections of the City expanded, however, the Southwest entered a period of decline. The housing stock deteriorated, and was not replaced or renovated on any significant scale. In 1954, with the closing of the Alexander Smith Carpet Mills, the Southwest's largest employer, the area began to lose its industrial base. In addition, the Getty Square central business district began to stagnate, a phenomenon attributed primarily to lack of adequate highway access and parking, and to increased competition from shopping malls such as the Cross County Shopping Center.

In 1949, with the passage of the National Housing Act of 1949, the City embarked upon a series of urban renewal and subsidized housing programs that have continued to the present day. Both programs have been largely confined to the Southwest section of the City. As of 1949, the City had two subsidized housing projects (the 550-unit Mulford Gardens and the 250-unit Cottage Place Gardens), both of which were located in Southwest Yonkers. Between 1949 and 1982, thirty-six more subsidized housing projects were developed, thirty-four of which are also located in Southwest Yonkers.[4] The two exceptions are Curran

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[4]A list of the subsidized housing projects and a map depicting their location appear as Appendix A to this Opinion. It should be noted that one of the projects, Seven Pines, is located across the street from the group of census tracts that are generally acknowledged to constitute Southwest Yonkers — namely, census tracts 1-6 and 10-13, or (for the years from 1960 on) their subdivided equivalents. Thus, strictly speaking, Seven Pines is just across the northern

(Footnote 4 continued on next page)

Court, a 186-unit project for senior citizens on Martin Ray Place in East Yonkers, and Hall Court, a 48-unit project for families in an East Yonkers neighborhood known as Runyon Heights. In all, the Southwest contains 6,644 or 97.7% of the City's 6,800 existing units of subsidized housing.[5]

The extreme concentration of subsidized housing that exists in Southwest Yonkers today is matched by an extreme concentration of the City's 18.8% minority population.[6] According to 1980 census figures, Southwest Yonkers accounts for 37.5% of the City's total population, but contains 80.7% of the City's minority population. Seven of the Southwest's seventeen census tracts have a minority population greater than 50%. Six more have a minority population ranging between 25% and 50%. None has a minority population that is less than 9%.

In contrast, only two of the thirty-two census tracts outside the Southwest have a minority population greater than 6%. One is census tract 7, whose 28.6% minority population is clustered in the southern end of the tract, where it abuts Southwest Yonkers

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border of Southwest Yonkers. However, as acknowledged by the City's own expert witness in urban planning, the project is, as a matter of urban topography, "as much or more related to the area to the south," Tr. 10,815-16 (Portman), and it accordingly is included in this Opinion as one of the thirty-six projects located in Southwest Yonkers. *See also* Tr. 402 (Davidoff).

[5]Since 1982, at least three additional projects have been approved and put into development in Yonkers. Two are in Southwest Yonkers: the conversion of a closed school on Hamilton Avenue into an 88-unit subsidized housing complex, and the construction of a 55-unit project on Willow Street. The remaining 45-unit project is on Palmer Road in East Yonkers (the first East side project approved since 1963). All three projects are senior citizen projects.

When those units are added to the existing total, the Southwest will contain 6,787, or 97.1%, of the City's 6,988 subsidized housing units.

[6]The term "minority," as defined in plaintiffs' respective complaints and in current census data, means those who are black or hispanic. Prior to 1970, the term "minority" as used in census data also included Asians and Indian-Americans and excluded "white hispanics," Tr. 122-24 (Davidoff); 11,947 (Armor), but at least with respect to the case before us, the discrepancy appears to have little or no significance. *See* fn. 63 *infra*.

and along the Hudson Division Railroad on the western edge of the tract.[7] The second is census tract 18 in East Yonkers, which contains Runyon Heights, a longstanding enclave of black home owners, and the site of Hall Court, the only subsidized housing project for families that is located outside Southwest Yonkers. The minority population of census tract 18 is 79.8%. The remaining thirty census tracts have minority populations ranging from 1.5% to 6.0%, with half having less than 3%. GX 1225.1, 1225.6.[8]

II. STATEMENT OF CLAIMS AND LEGAL STANDARDS

Plaintiffs contend that the existing concentration of subsidized housing in Southwest Yonkers reflects a pattern and practice of housing discrimination by the City in violation of Title VIII of the Civil Rights Act of 1968 (also known as the Fair

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[7]Census tract 7 is also the tract which contains Seven Pines, a 300-unit project for families on the northern border of Southwest Yonkers. *See* fn 4 *supra*.

[8]The City contends that Yonkers cannot be characterized as highly segregated since, according to one commonly used index of segregation, Yonkers compares favorably to most other major urban cities. The index in question, however, measures only the level of integration within individual census blocks and thus is a highly misleading measure when, as in Yonkers, the percentage of minorities among the general population is relatively low, but most of the blocks in which a significant number of minorities live are heavily clustered in one or two areas of the city. *See* Tr. 416-19; 422 (Davidoff). The figures described above preclude any serious argument about the extreme degree of segregation that exists in Yonkers today.

Housing Act)[9] and the equal protection clause of the fourteenth amendment to the United States Constitution.[10]

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[9]Section 804(a) of the Fair Housing Act prohibits practices which "make unavailable or deny . . . a dwelling to any person because of race, color, religion, sex, or national origin." 42 U.S.C. § 3604(a). In keeping with the broad purposes of the Fair Housing Act, § 804(a) has been construed to reach "every practice which has the effect of making housing more difficult to obtain on prohibited grounds." *United States* v. *City of Parma, supra,* 494 F. Supp. at 1053 (citing cases).

Section 813 of the Act authorizes the Attorney General to file suit when he has

> reasonable cause to believe that any person or group of persons is engaged in a pattern or practice of resistance to the full enjoyment of any of the rights granted by [the Act], or that any group of persons has been denied any of the rights granted by [the Act] and such denial raises an issue of general public importance. . . .

42 U.S.C. § 3613. The Attorney General's determinations of reasonable cause and general public importance are not reviewable. *See United States* v. *City of Parma, supra,* 494 F.Supp. at 1095 n.64. In addition, both the City of Yonkers and the CDA are "persons" within the meaning of 42 U.S.C. § 3613. *See United States* v. *City of Black Jack, Missouri,* 508 F.2d 1179, 1183-84 (8th Cir. 1974), *cert. denied,* 422 U.S.C. 1042 (1975). Thus, jurisdiction is proper under 42 U.S.C. § 3613.

Suits by private persons are authorized by § 812 of the Act. 42 U.S.C. § 3612; *see also Havens Realty Corp.* v. *Coleman,* 455 U.S. 363, 381 n.23 (1982).

[10]Although both the United States and Plaintiff-Intervenors allege in their respective complaints that the housing practices of the City violate the Constitution as well as the Fair Housing Act, subsequent filings by the United States, including its proposed conclusions of law, refer only to violations of the Fair Housing Act. In light of the government's apparent abandonment of its constitutional claim with respect to the housing portion of the case, and the apparent lack of any significant distinction (at least on the facts of this case) between the constitutional and statutory claims, *see* fn. 71 *infra,* we need not reach the complex question of whether the government in fact has standing to raise a claim of housing discrimination that is based upon the fourteenth amendment to the Constitution. *Cf.* SCHOOLS VI.A.2 *infra* (discussing the issue as it relates to a claim of segregation in schools).

Plaintiff-intervenors' equal protection claim is cognizable as an alleged violation of 42 U.S.C. § 1983, *Turpin* v. *Mailet,* 591 F.2d 426, 427 (2d Cir. 1979) (en banc) (per curiam), *cert. denied,* 449 U.S. 1016 (1980), and

(Footnote 10 continued on next page)

Specifically, plaintiffs contend that City officials, in response to constituent pressures, have made the preservation of existing patterns of racial segregation a controlling factor in site selection for subsidized housing. According to the plaintiffs, subsidized housing for families has been equated with minority housing, and for that reason, has been confined to the disproportionately minority areas of the City — most often, the downtown area of Southwest Yonkers. Subsidized housing for senior citizens is alleged to have been less consistently identified with minority housing, and therefore less consistently confined to minority areas. Nonetheless, according to plaintiffs, it, too, has met racially influenced resistance from area residents, often based on the concern that it might be converted to housing for families. Plaintiffs contend that the Saw Mill River Parkway has been viewed as the barrier separating overwhelmingly white East Yonkers from the racially mixed (and, since the mid-1960s, increasingly minority) population of Southwest Yonkers, and that City officials have been consistently unwilling, even when strongly pressed by federal authorities, to breach that racial barrier by placing subsidized housing for families east of the Saw Mill River Parkway.

The City, in turn, contends that its selection of sites for subsidized housing has been in no respect discriminatory, and that any segregative effect which the site selections may have had was entirely unintended. In particular, the City insists that the extreme concentration of subsidized housing in Southwest Yonkers reflects only a consistent strategy, adopted for reasons unrelated to race, to use subsidized housing to help rebuild Southwest Yonkers. In defense of that strategy, the City argues that it was recommended by outside consultants as well as by its own

(Footnote 10 continued from previous page)

jurisdiction is proper under 28 U.S.C. § 1343(3) and (4). Plaintiff-intervenors' identical claim under the thirteenth amendment is dismissed, however, since the practices challenged do not involve actual conditions of slavery or involuntary servitude. *See The Alma Society, Inc.* v. *Mellon*, 601 F.2d 1225, 1236-38 (2d Cir.) *cert. denied*, 444 U.S. 995 (1979).

planning staff, and that it was consistent with, and indeed even encouraged by, federal housing and urban renewal policy.

As the contentions of the parties suggest, the primary focus of the inquiry now before us is whether the actions challenged by plaintiffs were undertaken with discriminatory *intent* — specifically, the intent to create or maintain racial segregation. An action which merely has the unintended *effect* of creating or maintaining racial segregation violates neither the Constitution, *Village of Arlington Heights* v. *Metropolitan Housing Development Corporation,* 429 U.S. 252, 264-65 (1977) *(Arlington Heights I)* (citing *Washington* v. *Davis,* 426 U.S. 229 (1976)), nor, except in certain limited circumstances, the Fair Housing Act.[11]

A plaintiff is not required to prove, however, that segregative intent was the sole or even primary motive underlying the defendant's actions. Indeed, as the Supreme Court noted in *Arlington Heights I,*

> [r]arely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one. In fact, it is because legislators and administrators are properly concerned with balancing numerous competing considerations that courts refrain from reviewing the merits of their decisions, absent a showing of arbitrariness or irrationality. But racial discrimination is not just another competing consideration. When there is a proof that a discriminatory purpose has

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[11]While a showing of discriminatory effect can establish a *prima facie* case of a Fair Housing Act violation, it is not sufficient to entitle the plaintiff to relief unless the defendant has offered no race-neutral justification for its action. *See Robinson* v. *12 Lofts Realty,* 610 F.2d 1032, 1036-40 (2d Cir. 1979). Once, as here, a justification has been offered, at least some level of inquiry into the defendant's intent is always required. *See* fn 12 *infra.*

> been a motivating factor in the decision, this judicial deference is no longer justified.

429 U.S. at 265-66 (footnotes omitted).

A policy of racial segregation, in other words, is impermissible even as a secondary motive for action, and "cannot be justified by the good intentions with which other laudable goals are pursued." *Gautreaux* v. *Chicago Housing Authority*, 296 F.Supp. 907, 914 (N.D.Ill. 1969), (citing *Brown* v. *Board of Education*, 347 U.S. 483 (1954)); *see also Cooper* v. *Aaron*, 358 U.S. 1, 16 (1958) (quoting *Buchanan* v. *Warley*, 245 U.S. 60 (1917)); *United States* v. *City of Parma*, 494 F.Supp. 1049, 1054 (N.D.Ohio 1980), *aff'd in relevant part*, 661 F.2d 562 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

The factors that are to be considered in determining whether actions were taken with discriminatory intent include the degree of any discriminatory effect; the historical background of the actions; the specific sequence of events leading up to the actions; the presence or absence of departures from normal procedures or substantive criteria; and the legislative history of the actions. *Arlington Heights I*, *supra*, 429 U.S. at 266-68.[12]

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[12]With respect to claims brought under the Constitution, the Court's inquiry is ended if it finds that the plaintiff has failed to sustain its burden of proving discriminatory intent. *Arlington Heights I*, *supra*, 429 U.S. at 270-71. With respect to the Fair Housing Act, however, most courts that have considered the question have held that in view of the broad purposes of the Act, and the difficulty of proving intent, relief may be appropriate in some cases even when discriminatory intent has not been positively established. *See Robinson* v. *12 Lofts Realty*, *supra*, 610 F.2d at 1036-38 (citing cases).

The leading case in this regard is *Metropolitan Housing Development Corp.* v. *Village of Arlington Heights*, 558 F.2d 1283 (7th Cir. 1977), *cert. denied*, 434 U.S. 1025 (1978) (*"Arlington Heights II"*), in which the Seventh Circuit identified four factors to be considered in determining whether the relief requested is warranted under the Fair Housing Act. Those factors are: (1) the degree of discriminatory effect; (2) whether there is at least some evidence of discriminatory intent; (3) the defendant's interest in taking the challenged action; and (4) whether the remedy sought would compel the defendant to

(Footnote 12 continued on next page)

To prove a *pattern and practice* of discrimination, a plaintiff must prove that it was a regular (although not necessarily uniform) practice of the defendant to act with discriminatory intent. *See United States* v. *City of Parma, supra,* 494 F.Supp. at 1095. And in determining whether the plaintiff has carried that burden of proof, the court must view the evidence as a whole. *Id.* at 1055 (citing cases). As the District Court for the Northern District of Ohio explained in *United States* v. *City of Parma:*

> The character and effect of a general policy is to be judged in its entirety, and not by dismembering it as if it consisted of unrelated parts ... Even intrinsically lawful acts may lose that character when they are constituent elements of an unlawful scheme.

Id. (citations omitted). In large part, this rule is no more than a reminder of the general rule of evidence that when actions having a particular effect are repeated, the inference is stronger that the effect of the actions was intended. *See* 2 Wigmore, *Evidence* § 312 (3d ed. 1940).

III. THE CITY'S EARLY ACTIVITIES UNDER THE NATIONAL HOUSING ACT OF 1949

Upon passage of the National Housing Act of 1949, the City of Yonkers quickly applied for the federal housing assistance made available under Title III of the Act, and just as quickly encountered a serious obstacle to its ability to make use of the

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affirmatively provide housing for minorities or merely restrain the defendant from interfering with the efforts of others to do so. 558 F.2d at 1290-93. Clearly, the first three factors are merely a "relaxed" version of the *Arlington Heights I* intent inquiry, *cf. Stingley* v. *City of Lincoln Park,* 429 F.Supp. 1379, 1389 (E.D. Mich. 1977), that is justified by the fourth factor — the limited nature of the remedy sought.

In light of the strength of the evidence of intent in the case before us, it is unnecessary to reach the question whether entitlement to the broad remedial measures sought by plaintiffs here could be established under the relaxed "effects" standard set forth in *Arlington Heights II.*

assistance. The City's announcement of the first proposed site for a public housing project to be funded under the Act (a site in Northwest Yonkers) prompted immediate and strong opposition from area residents and civic associations. The phenomenon was one which would repeat itself with respect to most of the other sites subsequently proposed, and would strongly influence the willingness of the Planning Board and the City Council to approve the sites. The result was the loss of available and badly needed federal housing assistance, the repeated compromise of stated planning objectives, and, eventually, endangerment of the City's entire urban renewal program due to the City's consequent inability to provide relocation housing for those displaced by urban renewal. The sites that prompted community opposition almost invariably were those in overwhelmingly white East and Northwest Yonkers or the overwhelmingly white areas of Southwest Yonkers. The few sites that appear to have prompted little or no community opposition, and that successfully emerged from the site selection process, tended to be in the more heavily minority areas of the City — and in particular, in and around the downtown area of Southwest Yonkers.[13]

A. THE PROCEDURE FOR THE SELECTION AND APPROVAL OF SITES FOR PUBLIC HOUSING

Title III of the National Housing Act provides funds for the construction of public housing — that is, low-income housing owned and operated by a local housing authority.[14] Under the Act, the housing authority applies for a "reservation" of funds

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[13]Prior to 1969, the City Council was called the Common Council. For the sake of simplicity, however, it is identified throughout this Opinion as the City Council.

[14]"Public housing" is one form of "subsidized housing" — that is, housing in which federal, state, or local funds are used in some fashion to reduce the rental rate (or, less frequently, the purchase price) of housing units for qualified families or individuals. Public housing was the predominant form of subsidized housing in Yonkers until the mid to late 1960's.

sufficient to build a certain number of housing units. Sites are then selected by the housing authority, submitted for any necessary local approvals, and once locally approved, submitted to the federal authorities.

The agency authorized to proposed, construct, and operate public housing in Yonkers is the Yonkers Municipal Housing Authority ("MHA"), a public corporation organized in the 1930s pursuant to New York's Public Housing Law. Under that law, any projects undertaken by the MHA must be approved by a majority vote of both the City's Planning Board and the City Council, or (if the Planning Board disapproves), by a three-quarters majority of the City Council.

The City Council consists of twelve members plus the Mayor, all of whom are elected for two-year terms. Throughout the years in question, each of the City's twelve wards held a separate election to choose a representative on the Council. The only member chosen in a city-wide election was the Mayor, who serves on the Council as a Councilmember-at-large.

The Planning Board and the MHA Board each consists of seven members. Planning Board members are appointed by the Mayor; MHA Board members are appointed by the City Manager, who, under the City Charter, is the chief executive and administrative officer of the City, and who, in turn, is appointed by the City Council.

B. SITE SELECTION FOR THE CITY'S 1949 ALLOCATION OF PUBLIC HOUSING UNITS

City officials were eager to take advantage of the housing assistance made available under Title III of the 1949 Housing Act. Due to the rapidly deteriorating condition of the housing stock in the Southwest, there was, in general, a serious need for decent low-cost housing in Yonkers. In addition, the construction of public housing was perceived to be important to the urban

renewal plans which the City had begun to formulate in response to the urban renewal assistance made available by Title I of the 1949 Act.

Title I established a program of loans and capital grants for slum clearance and redevelopment; the program contemplated that cities would acquire and clear blighted land, prepare the site, and then sell or lease it to private enterprises for redevelopment. Title I also required, however, that the cities provide "decent, safe and sanitary" housing for persons displaced from urban renewal areas, and city officials considered public housing to be the only likely source of relocation housing for families living in urban renewal areas. GX 1058.16.

In August of 1949, a few months after the passage of the 1949 Act, the City applied for a reservation of 1,000 units of public housing, and received an allocation of 750 units. The deadline for site submission was August of 1950. It took the City nine years, however, to approve a sufficient number of sites to make use of that first year's allocation of public housing units, and the chief reason for the delay was recurring community opposition to the various sites proposed.

The MHA announced its first proposed site in February of 1950. The site was a vacant parcel of land on Nepperhan and Roberts Avenue, an overwhelmingly white area in Northwest Yonkers. GX 1225.41. Among the stated reasons for the selection of the site was that the use of vacant land (as opposed to a site which required clearance of existing structures) was less costly and would eliminate the need for relocating those displaced by the clearance of the site — a task that had proven to be a major obstacle to the timely completion of Cottage Place Gardens, the second of the City's two existing public housing projects. GX 1058.5; 1053.27.

Within a week of the MHA's announcement of the Nepperhan/Roberts site, however, a neighborhood group called the

Rose Hill Community Association adopted a resolution opposing the choice. Copies of the resolution were sent to the MHA, the City Planning Board and the City Council. GX 1058.6, 1058.9. A few days later, the Yonkers Council of Civic & Taxpayers Associations joined the opposition. GX 1058.8. The Rose Hill resolution urged that public housing be used to clear slums, and it maintained that the Nepperhan/Roberts site was, in any case, inappropriate for public housing due to inadequate school, transportation, and shopping facilities. "Locating this project in a present slum area," the resolution added, "would not have a school problem as the school probably already exists." GX 1058.9. The Nepperhan/Roberts site was subsequently disapproved by the Planning Board, GX 1058.17, an action which prompted a letter of commendation from the Yonkers Council of Civic & Taxpayers Associations. GX 1058.22.

At least two other sites formally proposed by the MHA soon thereafter likewise prompted strong community opposition. Indeed, the volume of complaints received by the Mayor's office with respect to the various sites being considered for public housing was so great that two members of the City Council were appointed to attend MHA meetings, consult with the MHA Board, and in general "let the public know that the [City] Council [had] an interest" in site selection. GX 1204.4.

The two sites in question — Park Hill Avenue at Van Cortlandt Park Avenue and Lake Avenue — were both in heavily white areas of Southwest Yonkers. GX 1225.41. In addition, both were originally supported by the councilmen representing the wards in which the sites were located (the seventh and sixth wards respectively), and then subsequently opposed by those councilmen, after local residents had made their own opposition known. Seventh ward residents appeared at a Planning Board meeting held to consider the Park Hill Avenue Site and submitted a petition in opposition. A resident identifying himself as a spokesman for the group stated that "it was not in the best

interests of the City of Yonkers and certainly not to the best interests of adjacent property owners, to place this project on this site." GX 1058.24. The resident contended that the "terrain [was] irregular" and that the project "would have a tendency to harm property values in the neighborhood. . . ." *Id.* A few days later, a new article reported that the councilman for the seventh ward, who had previously asked that his ward be surveyed for possible sites, had written to the Chairman of the City Planning Board (with a copy to press), asking that the Park Hill Avenue site be excluded from consideration and expressing his disappointment that the Nepperhan/Roberts site in Northwest Yonkers had been rejeced. GX 1058.25. No further action was taken on the seventh ward site.

Similarly, a site on Lake Avenue in the sixth ward was originally recommended by the ward councilman and approved by the Planning Board and City Council. GX 1058.31, 1058.37, 1058.43, 1058.47. A subsequent attempt to expand the site, however, resulted in strong public opposition to both the expansion and the site itself. Representatives of an ad hoc committee of sixth ward residents appeared at a Planning Board meeting to present a petition in opposition and to speak against the site. GX 1058.47. The committee's objections were repeated at two additional Planning Board meetings held several weeks later, at which time the ward councilman announced that he, too, was now opposed to the site. GX 1058.48; GX 1058.51. The Planning Board voted unanimously to disapprove the requested extension, and the following week the MHA voted to abandon the site. GX 1204.6. Area residents appeared at the MHA meeting with a petition bearing 1,000 signatures which, they maintained, "barely scratch[ed] the surface of those who object to the site." *Id.* A spokesman for the protesters mentioned in passing the inadequacy of school and transportation facilities, but then characterized those as "minor objections," and stated that the "real objection" to a housing project on the site was the effect that it would have

on property values in the area. He predicted that it would cause "financial ruin" to neighboring property owners. *Id.*

By December of 1950, three months had passed since the deadline for submitting sites for the City's 1949 allocation of 750 public housing units, yet the City had approved and put into development only one site. The site was on Palisade Avenue, in one of the more heavily minority areas of Southwest Yonkers, slightly to the south of, and halfway between, the City's two existing public housing projects. GX 1225.41. The site had apparently prompted no public opposition, and although the City's Planning Director had suggested that the site was better suited for industrial use, it had been approved and was scheduled for 274 units of public housing. GX 1058.37; 1058.38.

In December, a federal official appeared at a meeting of the MHA and told the City that it faced imminent loss of the nearly 500 units remaining in its reservation unless additional units were put into development immediately. GX 1204.7. The official also cautioned that funding decisions for future years would take into account whether the City had been able to make use of previous allocations. *Id.* The City responded by voting to increase the number of units scheduled for the Palisade Avenue site to 415, despite a prior recommendation by the Planning Board that the size of public housing be limited to 250 units so as "to reduce their impact on the neighborhoods where they are located" and so that they might "be better integrated with other types of housing existing or to be built in the project areas." GX 1058.16 at 11767. When the 413-unit Schlobohm Houses opened on Palisade Avenue, all of the City's 1,213 units of public housing were concentrated within several blocks of each other in Southwest Yonkers.

In 1951 through 1953, efforts continued to find approvable sites for the more than 300 public housing units remaining in the City's 1949 allocation. Eleven sites were formally proposed by the MHA (six in the Southwest, two in the Northwest, and three in East Yonkers), but none was approved and submitted to the

federal authorities, and the remaining units of public housing were lost by the City when the funding legislation expired in 1953.[15]

Once again, the period was characterized by pervasive community opposition to the various sites proposed. City officials were heard to observe during these years that there seemed to be opposition to every site proposed, GX 1058.65, that "[s]ome civic organizations are in favor of public housing as long as you don't put it in their neighborhood," GX 1059.4, and that the more time that was given to the consideration of a site, the more objections there were. GX 1204.13. The Yonkers Council of Civic & Taxpayers Associations meanwhile continued to urge that public housing be used solely to clear slums, GX 1058.102; 1059.6, and it was joined in that position by other residents, GX 1059.1; 1058.86, and even, on occasion, by some councilmen. GX 1204.13.

At least eight of the eleven sites formally considered during these years (including all three east side sites) prompted opposition from area residents, local civic associations, and ward councilmen.[16] And once again, a dominant concern — particularly in connection with the sites proposed in East Yonkers — was the effect that a public housing project would have on surrounding property values.

With respect to one East Yonkers site, for example, a letter sent to the Planning Board and quoted by the press objected to the prospect of being "uprooted" from the neighborhood and

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[15]The eleven sites were: Hawthorne Avenue, Prescott Street, Prescott Field, Sullivan Oval, the Waring site, and the Jefferson-Riverdale (or "Stage I") urban renewal area (all in Southwest Yonkers); Boyce-Thompson and Frederic Street (in Northeast Yonkers); and Raybrook Road, Midland Avenue, and Coyne Park (in East Yonkers). GX 1058; 1059.

[16]The other five were the two sites in Northwest Yonkers and three of the Southwest Yonkers sites: Hawthorne Avenue, Prescott Field, and Sullivan Oval. *See generally* GX 1058; 1059.

stated that it was "a well-known fact that slum-clearance projects often lead to the eventual deterioration of the surrounding community by the element which they attract." GX 1059.5. Various neighborhood associations likewise contended that selecting one of the East side sites proposed "would be seriously detrimental to [the] well-being . . . and interest" of area residents and indeed of the City as a whole. GX 1059.7; *see also* GX 1059.6; 1059.8; 1059.9. The president of one of those associations suggested to the City Planning Board that the East side sites under consideration should be reserved for the same "class of people now there," GX 1059.9, and argued that the "people a public housing project would serve" would in any case find it burdensome to travel to East Yonkers. *Id.*

Edward O'Neill, the councilman for the East side ward in which the proposed sites were located, likewise argued strongly against their appropriateness for public housing. Soon after the sites were announced, O'Neill publicly declared that he was "not opposed to low-rent housing, but it was inconceivable to [him] that it should be located in areas where there is no possible need for it and where those areas cannot possibly handle it." GX 1059.6. O'Neill noted that "practically every civic and social group in [his own and a neighboring East side] ward has gone on record strongly opposing the location of low rent housing on premium land," and that since the East side schools were already overcrowded, the addition of 335 families "would cause irreparable harm." *Id.* In addition, O'Neill appeared at a Planning Board meeting held to consider the sites and argued that putting public housing in "fine, residential" communities would be "a body blow to [the City's] finances." GX 1059.9; GX 1059.10. O'Neill appealed to the Board "as property owners," suggesting that they surely knew

> what public housing does to the surrounding areas. If you put housing in an area not desirable for it you do a disservice to

> the people in that neighborhood. Many people have sunk their last cent into their homes.

GX 1059.10.

Like the sites opposed by area residents in 1950, the eight sites opposed in 1951 through 1953 all were in areas of the City that were overwhelmingly white. GX 1225.41. Two of the three sites for which there is little or no evidence of opposition — including one (the Waring site) which was strongly supported by some civic associations and councilmen as "ideal" for public housing — were in the downtown (and more heavily minority) portion of Southwest Yonkers. *Id.*[17] MHA members characterized the Waring site as a "realistic" choice that had the "greatest chance" of winning City Council approval and proposed it twice as the final deadline for site submission drew near in 1953. GX 1059.4; 1204.18. The Planning Board, however, rejected the site each time, explaining that it was poorly situated for residential use and in an area that was already overcongested. GX 1059.11; 1059.17.

In 1956, under new funding legislation, the City was able to renew its reservation of the 335 public housing units remaining in its 1949 allocation. However, when site selection efforts resumed in 1956, the pattern of community opposition resumed as well. Despite formal consideration of at least eight sites in 1956 and 1957, and despite repeated expressions of concern by City officials that readily available housing assistance might once again be lost, and that the City's urban renewal plans might be delayed for lack of relocation housing, *see e.g.*, GX 1060.16; 1060.23; 1060.25; 1060.41; 1062.2; 1062.19, the City did not approve a single site for public housing.

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[17]The third site (Prescott Street) was withdrawn almost immediately after its proposal by the MHA and replaced with nearby Prescott Field, which, as noted above, was among the eight sites that prompted community opposition.

Four sites (two in Southwest Yonkers and two in East Yonkers) were formally proposed by the MHA in 1956. Three prompted vigorous community opposition; the fourth (Western Avenue in Southwest Yonkers) was opposed by the Planning Board on the ground that it was in the path of a proposed arterial route. None was approved by the City Council.

With respect to two of the three sites that prompted community opposition — St. Nick's Oval in East Yonkers and a site on Fillmore and Garfield Streets in Southwest Yonkers (commonly known as the Russian American Memorial Park or RAMP site) — the pattern was the same as in previous years. The sites were in overwhelmingly white neighborhoods, GX 1225.41, and were vigorously opposed by area residents and neighborhood associations at rallies and in petitions and letters. *See generally* GX 1060.

The third site, however, presented a variation on the theme. The site (Ridgeview Avenue) was in Runyon Heights, a long-standing and self-contained enclave of black homeowners in East Yonkers, and its proposal produced the first apparent evidence of open discussion of the racial implications of site selection for public housing. An attorney for one of the Runyon Heights neighborhood associations told the City Council that the trend had moved "away from putting housing sites in minority areas, as it has a tendency to create slums" and argued that the City "must give this area a chance to break its bounds," saying that "if we drop a housing project in there, it will never have a chance." P-I 105-17. A spokesman for the Yonkers branch of the NAACP similarly declared that the organization was "disturbed" to find a project being proposed for an area that was so heavily minority, warning that the project could become a "Negro project" and the school that served it a "Negro school." *Id.* A representative of the Urban League of Westchester County also appeared before the City Council and opposed the project, arguing that studies had shown that when a housing project was put in a predominantly black area, it became "difficult to obtain [a] nonsegregated occupancy." *Id.*

At two City Council sessions attended by some 400 to 1,000 area residents, the Council voted to disapprove all three sites — actions which reportedly prompted applause and cheers from the audience. GX 1060.23; 1060.40; P-I 105-42. Although the votes were unanimous, there were expressions of concern by some council members about the effect of the votes since the new deadline for site submission was only a few days away. *Id.* As the last site (St. Nick's Oval) was disapproved, one councilman observed that he felt the vote was "signing the death knell" for the city's reservation of housing units, and that the City could not hope to obtain urban renewal funds unless it had a place to relocate displacees. P-I 105-42.

However, the City was able to obtain yet another extension of the deadline, and site selection efforts continued. In 1957 and 1958, community opposition was a frequent topic of discussion in site selection meetings and press reports. *See generally* GX 1062, 1063. In January of 1957, for example, the councilman for the fourth ward proposed a tenth ward site, saying that its relatively isolated location made it "a natural" for public housing since "no indignant citizens could come and protest." GX 1062.1. Protests *were* reported, however, by the tenth ward councilman, who promised to defeat the proposal. GX 1062.3, and the MHA voted unanimously to reject the site. GX 1062.5.

Meanwhile, two Southwest Yonkers sites were proposed by private developers for Mitchell-Lama projects, a state-funded subsidized housing program for middle-income (and, therefore, usually white) residents. The proposals prompted no opposition, and the City Council readily approved the tax abatements needed to enable the two projects — Sunset Green (a 70-unit cooperative on Hawthorne Avenue) and Sunnyside Manor (a 121-unit rental building on Sunnyside Drive) — to go forward. GX 1061; 1066.

In the spring of 1958, the MHA tried again and proposed five more sites for public housing. Three were in Southwest Yonkers (Stanley Avenue; School Street; and Western Avenue); and two

were in East Yonkers (the old School 1 site and Smart Avenue). GX 1063.2. Emmett Burke, the Secretary-Director of the MHA, described the sites to the Planning Board as "the least objectionable" of those surveyed but nonetheless that there would be "a lot of objections on the grounds of race or age in certain sites." GX 1063.8. Burke went on to observe that "[m]any people simply do not want public housing." *Id.* The Planning Board approved the Stanley Avenue, Smart Avenue, and School 1 sites, and disapproved the School Street and Western Avenue sites (the latter for the second time) on the ground that lay in the path of a proposed arterial route. *Id.* Two of the sites approved by the Planning Board were in overwhelmingly white neighborhoods; the third (the School 1 site) was in Runyon Heights. GX 1225.41.

In April, as the City Council was preparing to consider the proposed sites, a letter was sent to the council members from a committee claiming to have been delegated by twelve taxpayer and civic associations "to acquaint each and every member of the [City] Council with the fact that there is tremendous opposition to additional low rent public housing in Yonkers." P-I 106.26 (GX 1063.13). The letter went on to state that:

> We personally prefer a public referendum with time to acquaint each and every citizen with the full facts on public housing. Where will these tenants come from? How will we provide schools? How much will it cost us over the years? What safeguards do we have against our having to absorb the overflow from Puerto Rico or Harlem? Where will the people go that will have to vacate their private homes?

Id. The letter closed by saying that "each and every one of your constituents is looking to you to again knock down this latest attempt on the part of the public housing group to shove off on the citizens of Yonkers something that the majority does not want." *Id.* A week later, the City Council voted to refer the proposed sites to its committee on housing. GX 1065.15.

The following month, as the Council again prepared to vote on the sites, Mayor Kristensen publicly observed that "we're running into the same situation we customarily do and have done over the past nine years or so, that is, everyone wants housing, but no one wants it in his neighborhood. . . . The time is coming when we are going to get those 335 units one way or another." GX 1063.17.

On May 27, 1958, nearly nine years after the City received its 1949 allocation of public housing units, the City Council finally approved two sites for the last of the units in the allocation. In addition, a third site was approved for 108 units of senior citizen housing (a newly authorized form of public housing). The three sites approved were School Street and the School 1 site for family housing and the Western Avenue site for senior citizen housing. GX 1063.18.

In making its choices, the Council appears to have given little weight to the views of its Planning Board. The School Street and Western Avenue sites were strenuously lobbied against by the Planning Board on the ground that they would interfere with construction of an arterial system that was critical to the future health of the downtown area. GX 1063.8; 1063.17; *see also* Tr. 9621-24 (Pistone). Yet, both sites were approved by the Council.[15] In addition, the Planning Board recommended the Stanley Avenue and Smart Avenue sites — and indeed the City's Planning Director, Philip Pistone, had characterized the latter as "ideal." GX 1063.8; Tr. 9616-17 (Pistone). Yet, the Smart Avenue site was strongly opposed by area residents and the ward councilwoman, and both sites were rejected by the Council. GX 1063.8; 1063.18; 1063.19.

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[15]While it is true, as the City notes, that the Council had previously indicated some disfavor with the State's proposed arterial plan, the fact remains that its own planners still strongly supported the plan and strongly urged the City not to foreclose it by constructing housing on the Western Avenue and School Street sites. C-50; GX 1063.8; 1063.17; Tr. 9621-24 (Pistone).

Following a by-now familiar pattern, the sites rejected were in overwhelmingly white areas of the City, and both sites approved for family housing were in heavily minority areas. GX 1225.41. Only the Western Avenue site which was to be used for senior citizen housing was in a heavily white area, and even that site was not far from blocks with a significant minority population. *Id.*[19]

C. Site Selection for Senior Citizen Housing

For the next few years, the City focused primarily on public housing for senior citizens — an activity that proved somewhat less controversial but not entirely problem-free. In 1961, a proposal to put 300 units of predominantly senior citizen housing on Garden Street just north of Schlobohm Houses (the 413-unit project built on Palisade Avenue in the early 1950s) was approved with no apparent community or official opposition, GX 1064.1-.5, despite the fact that with Schlobohm Houses in place, the area already contained an amount of public housing that was far in excess of what the Planning Board had recommended. *See*, HOUSING III.B *supra*. A subsequent attempt to expand the site in 1962, however, *did* prompt opposition on the ground that it would result in an overconcentration of public housing units in the area. GX 1064.14, 1064.15, 1064.19. The Planning Board initially disapproved the expansion, then three months later voted 3-2 (with two members absent) to reverse itself. GX 1064.16; GX 1064.19; 1064.20. A colloquy that immediately preceded the second vote suggests that little had changed from the preceding years. Planning Director Philip Pistone stated that he would prefer to have senior citizen housing "dispersed," and that there was "no reason why it should all be concentrated in one area . . . one ward." GX 1064.20. In response, a Board member

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[19]The 48-unit Hall Court opened on the old School 1 site in 1962; the 108-unit Loehr Court opened that same year on Western Avenue; and the 278-unit Calgano Homes opened on School Street in 1964. C-1700.

stated simply that, "what you say is interesting, but when you come up before the [City] Council, every councilman objects to it." *Id.* The Planning Board's vote was subsequently challenged and held invalid on the ground that the full Board had not been present. GX 1064.21; GX 1064.23. The City Council then deferred consideration of the expansion, and it was apparently pursued no further. GX 1064.24.[20]

Instead, a new round of efforts was undertaken to find sites for senior citizen housing. In February of 1963, the MHA proposed eight sites — four in Southwest Yonkers and four in East Yonkers. GX 1069.7.[21] The sites were announced as proposed sites for senior citizen housing, but the Secretary-Director of the MHA was quoted by the press as saying that the sites might also be considered for family housing. GX 1069.7. Protests quickly arose with respect to three of the East side sites, and these sites were largely dismissed by the MHA's Secretary-Director at a subsequent Planning Board meeting. GX 1069.10; 1069.11; 1069.13; 1069.15. The Lincoln Park Taxpayers Association, writing in opposition to the sites, raised familiar concerns about decreasing property values and adverse effects on the "character of the community." GX 1069.11. The Association urged, as other groups had in the past, that public housing be used solely to clear slums. *Id.* No distinction was drawn between public housing for senior citizens and public housing for families. Concern was simply expressed that the placement of any public housing in the area would be "at the sacrifice of real estate values in the community, and [that] declining real estate values would be followed by neglect and deterioration of the neighborhood." *Id.*

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[20]The original plans for the Garden Street site went forward, however, and the 300-unit Walsh Houses opened in 1967. C-1700.

[21]The East Yonkers sites were Martin Ray Place, Kingston Avenue, Boyd Place/Bronxville Road, and Midland at Yonkers Avenue. The Southwest Yonkers sites were Center Place, Orchard Street, Ashburton Avenue at Seymour Street, and Riverdale Avenue at Highland. *Id.*

The following month, in early March of 1963, the Housing Committee of the City Council recommended approval of two of the other sites for senior citizen housing — Martin Ray Place in East Yonkers (where temporary veterans housing had been located) and a site on Ashburton Avenue and Seymour Street in Southwest Yonkers — and the Council scheduled a site selection hearing for March 26th. GX 1069.20. The next day, the MHA withdrew the remaining six sites from consideration. GX 1069.21.

In the weeks before the hearing, the Board of Education and the PTA opposed selection of the Martin Ray Place site on the ground that it had been promised to the Board for a much needed expansion of School 31. GX 1069.22; 1069.25. In addition, the Pastor of St. Joseph's Church opposed the selection of the Ashburton/Seymour site on the ground that there was already a serious overconcentration of public housing in the downtown Southwest Yonkers area. GX 1069.24. Both protests were reiterated at the City Council hearing. GX 1069.26; 1069.28. No neighborhood or civic associations appear to have joined the opposition, however, and faced with a firm site selection deadline of April 1 (the deadline having already once been extended), and with a reported 1,800 to 2,000 applications for senior citizen housing, the Council voted to approve both sites. GX 1069.27; 1069.28. The thirty-two unit Kristensen Houses (on Seymour Street) and the 186-unit Curran Court (on Martin Ray Place) opened in 1967. C-1700.

D. The City's Campaign to Produce Sites for Relocation Housing

From 1958 (when the last of the City's 1949 allocation of public housing units for families was finally put into development) through 1965, no apparent efforts were made to increase the City's stock of public housing for families. The only additional family housing approved during this time came with the decision to devote the City's Jefferson-Riverdale (or "Stage I") urban

renewal area (an area just southwest of City Hall in downtown Yonkers) to middle-income housing. In the spring of 1962, the City Council approved, without apparent objection, a tax abatement for a 544-unit Mitchell-Lama project to be called Phillipse Towers, GX 1067.5; 1067.11, and the project opened in September of 1964. GX 1067.13.

The City's long period of inactivity with respect to the development of low-income family housing does not appear to have been based on any perception that what had been characterized as a "desperate" need for such housing — both in general and as a relocation resource — had been met. A strong indication that the need had not been met came in 1965, when HUD notified the City that its preliminary application for its Stage II (or "Riverview") urban renewal project had been rejected. The project would have involved the relocation of 1,300 families, and was rejected on the ground that the City's relocation track record for the Stage I project had been poor. HUD set a maximum relocation workload of 300 families for the Stage II project. GX 1071.13; 1078.4. In response, the City embarked on a vigorous campaign to find and approve sites for family housing. Joining in the effort was the newly formed Yonkers Urban Renewal Agency ("YURA").[22] As in previous years, however, community opposition proved to be a major stumbling block.

In the months after HUD rejected the City's initial Stage II urban renewal application, the need for more public housing as a source of relocation housing, and the problem of persistent

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[22]YURA was organized in 1964 as a semiautonomous agency with the power to plan, undertake, and effectuate urban renewal projects, subject to the approval of the City Council, and it remained in operation until 1971. YURA was governed by a five-member board, which, pursuant to statutory requirement, consisted of the City Manager, the Mayor, the Corporation Counsel, the City Comptroller, and the City Planning Director.

In 1971, YURA was redesignated the Community Development Agency (CDA), and its governing board was expanded to include two City residents appointed by the Mayor with the advice and consent of the City Council.

community opposition to sites proposed for such housing, were frequent topics of discussion in meetings held among City agencies and with the federal authorities. *See generally* GX 1078. In one meeting, the Mayor was asked to explain the nature of the City Council's objections to two Southwest Yonkers sites (one between Stanley and Riverdale Avenues and another on Culver Street). GX 1078.3. The Mayor replied that the two ward councilmen involved "feel that their wards are being declared 'blighted areas' and they are not too happy about it because it will affect the voting." *Id.*

A subsequent meeting in April of 1965 among George Piantadosi (the acting director of YURA), Philip Pistone (the City's Planning Director), and Emmett Burke (Secretary-Director of the MHA) yielded a list of twelve possible sites for public housing. GX 1078.8.[23] In an apparent attempt to deflect potential opposition to the sites, it was agreed that a press release would be issued listing the sites but identifying them merely as "sites under discussion," and that no individual would be identified on record as supporting specific sites. *Id.*

The anticipated opposition came to pass the following month. The MHA submitted eleven sites (nine from the joint list plus two others) to the Planning Board and the City Council. GX 1078.12; 1078.21.[24] The three East Yonkers sites on the list as well as two sites in the overwhelmingly white Nodine Hill area of Southwest Yonkers prompted letters and petitions in opposition

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[23]Four of the sites were in East Yonkers: Bronx River Road/Crescent Place; Bronx River Road/Louisiana Avenue (the Steuber's Florist site); Texas/Georgia Avenues; and Sweetfield Circle. The remaining eight were in Southwest Yonkers: Palisade/Carlisle; Stanley/Riverdale; Culver Street; the Old Car Barn; Garfield/Fillmore (Prescott Street); Hawthorne/Riverdale; Croton Terrace; and Orchard Street.

[24]The three sites not submitted from the joint list were two in Southwest Yonkers (Culver Street and Orchard Street) and one in East Yonkers (Bronx River Road/Louisiana Avenue). Added to the list were two additional sites on Croton Terrace and Garfield/Fillmore Streets in Southwest Yonkers.

from area residents, civic associations, and (in the case of the two East side sites in the twelfth ward) from the ward councilman, Nicholas Benyo. GX 1078.15; 1078.17-19; 1078.23; 1078.26-28. Councilman Benyo protested to the Planning Board that the areas "still [had] not recovered from the heavy invasion of apartment buildings" there and that "[a]ny further concentration of population would lead to a rapid deterioration of the entire area." GX 1078.15.

As the Planning Board and City Council were preparing to act on the sites, *The New York Times* published a story on the controversy, describing at some length "the split between suburban conscious East Yonkers and urban conscious West Yonkers." GX 1078.16. The article reported that previous projects had been "built in slum areas, reinforcing what planners call socio-economic ghettos," and quoted one resident of East Yonkers as saying that her family had "saved for years to move out of the city," and that "now they want to put right next door everything we tried to get away from." *Id.* Another East Yonkers resident was reported to have explained that it wasn't that she didn't believe in racial or social or economic integration . . . but [that] those people from Yonkers would feel so out of place here . . . it would not be fair to them." *Id.*

The *Times* article was cited to City officials in a letter from the pastor of a Southwest Yonkers church, who said that its reference to reinforcing socio-economic ghettoes "sums up our argument" against the placement of more subsidized housing in the downtown area of Southwest Yonkers. GX 1078.22. "Basically," the letter declared, "this is out and out discrimination not only against negroes, but against lower-income whites as well." *Id.*; *see also* GX 1078.14.

In May of 1965, the Planning Board voted to disapprove all of the sites except four in Southwest Yonkers. GX 1078.28. The only comment recorded in the Planning Board minutes with respect to the two twelfth ward sites in East Yonkers was that

Councilman Benyo and his constituents were opposed to the site. *Id.* One week later, the City Council referred all eleven sites to its committee on housing, where they remained until April of the following year. GX 1078.32.

In December of 1965, with the matter still in committee, Emmett Burke, the Secretary-Director of the MHA, sent a memo to the City Council asking for a decision on the sites. The Council, in turn, referred Burke's memo to YURA, which replied merely that public housing was indeed needed for relocation housing, but that it would "not presume to recommend for or against any of the sites selected." GX 1078.43. Nevertheless, at a meeting held the same day with a citizen's advisory committee, George Piantadosi, the acting director of YURA, criticized the City Council for "doing nothing" about public housing, and one of the committee members suggested that the committee undertake its own site investigation. GX 1078.44.

In February of 1966, Burke wrote to the City Manager, asking again "for serious and immediate consideration" of the eleven possible housing sites. GX 1078.48. He explained that there were eighty-seven unused housing units from a previous reservation that might still be available to the City, but that he could not justify attempting to retain or expand the reservation (as would be necessary if future relocation needs were to be met) unless housing sites were approved and ready for development. *Id.*

Two months later, the Council's Housing and Urban Renewal Committee finally acted, recommending the same four sites that the Planning Board had approved eleven months earlier. GX 1078.51. Recalling the pattern of previous years, the sites not recommended by the committee were in areas of the City that were overwhelmingly white, and the four sites recommended were in areas of the Southwest that were, or were rapidly becoming, heavily minority. GX 1225.42; 1225.44.

The committee's recommendation was strongly criticized by the Yonkers Council of Churches, the NAACP, CORE, and a member of the Yonkers Human Rights Commission. The groups noted that all four sites were located in the "core" or "ghetto" area of the City, and they suggested that the selection represented acquiescence on the part of the Council to the "phenomenal pressure" put on it by the residents of other areas of Yonkers and "portend[ed] a greater ghettoization of those neighborhoods whose 'powerless' and 'voiceless' residents could not generate the same kinds of 'pressures' as could the other residential neighborhoods where" sites had been proposed. GX 1078.58, 1078.60, 1078.62, 1078.64.

In addition, the groups noted that three of the sites were densely occupied and presented serious relocation problems, GX 1078.58, 1078.60, 1078.64, an assessment with which YURA concurred. GX 1078.66. The groups gave qualified support to the fourth site (on Hawthorne Avenue) as representing the "lesser of evils," but urged the City to adopt a policy of "scattering" its public housing throughout the City. GX 1078.58, 1078.60, 1078.62, 1078.64.

The following month, in May of 1966, the City Council voted to approve the Hawthorne Avenue site and to refer the other three back to committee. GX 1078.62; GX 1078.63. However, due to an apparent breakdown of communication between the Council and YURA on one side and the MHA on the other, the site was not submitted to HUD for another several months.

When the site finally was submitted, HUD declared it to be unacceptable. The City was advised by the Regional Administrator in HUD's New York office that the Hawthorne/Riverdale site was "marginally feasible" and presented problems with respect to the "potential concentration of minority groups." GX 1078.94. The HUD official urged consideration of alternate sites, especially "scattered sites." *Id.*; 1078.106. In reply, YURA wrote that an "evaluation of family incomes, size, and other criteria indicate

that a very well balanced racial mix will result from relocating just our urban renewal relocatees" and that "the fears you express about the creation of a 'racial ghetto' will depend largely on the admission practices of the [MHA]." GX 1078.98. Two months later, in November of 1966, HUD formally notified the City that it would take no immediate action on the Hawthorne/Riverdale site and asked for the submission of alternate sites. *See* GX 1078.111.

Later that month, amid public calls by the Chamber of Commerce and the Yonkers Economic Development Corporation for the approval of sites for relocation housing so that the City's urban renewal plans would not be delayed any further, GX 1078.113, 1078.115, 1078.116, 1078.120, the City Manager, as Chairman of YURA, wrote to the City Council stressing the importance of public housing to the future of urban renewal in the City and "urgently request[ing]" immediate reexamination of all the sites in committee as well as consideration of expanding the Hawthorne/Riverdale site. GX 1078.118.

At one YURA meeting, City Manager Adler expressed the hope that at least one more site — namely, the Bronx River Road site in East Yonkers — could be approved, but noted that "[e]verytime a site comes up a councilman will say 'not in my ward.'" GX 1078.117. Later in the meeting, it was announced that YURA would undertake its own search for sites. The task was to be handled by a subcommittee of YURA's Citizens Advisory Committee ("CAC"), who, according to Piantadosi, were "going to war to get sites for us." *Id.*

The CAC Subcommittee's efforts resulted in a list of nineteen sites scattered throughout the City. GX 1078.124. None, however, was developed for public housing, nor does it appear from the record that any serious study was given to the list. The only effect the list appears to have had was to further publicize the degree of opposition that existed to the placement of public housing in any heavily white area of Yonkers.

The existence of the CAC list first came to public attention after a joint meeting among the MHA, YURA, the Yonkers Commission on Human Rights, and the YURA-CAC, at which City officials debated whether the list should be released to the press. GX 1078.125; 1078.39. According to press accounts, which dubbed the list the "secret renewal sites," two councilmen, Alfred Del Bello and Jesse Eisen, expressed concern about the pressure that would be brought to bear on councilmen unless the public was educated about the need for site selection on a city-wide basis. GX 1078.125; 1078.126; 1078.128. "[C]ouncilmen," Eisen warned, "will have to have a great deal of intestinal fortitude." GX 1078.125. Del Bello added that he did not think the City's councilmen had "sufficiently strong shoulders to consider sites no matter what time of year" it was. Fear was reportedly expressed by several speakers that "the public is not yet ready to accept the federal government's plan for racial and economic integration on a citywide basis." Nonetheless, Councilman Eisen and Chema expressed support for the concept of scattered sites, with Eisen quoted as saying "Let's not scatter them in Southwest Yonkers." *Id.*

The CAC list was obtained and published by the press a few weeks later, causing, in the words of YURA members, "a great deal of alarm in the community." GX 1078.133.

The Taxpayers Organization of North East Yonkers invited George Piantodosi, the acting director of YURA, to speak to the group about the CAC list. Instead, Piantadosi wrote to the group, reassuring them that CAC's role was solely an advisory one, that the consideration of any of the sites was still in early stages, and that a "thorough study" of each was called for and would include consideration of the "attitude of the local community toward accepting public housing." GX 1078.138. The list of nineteen sites was passed on to the City Manager in January of 1967 with the CAC's recommendation that five be given further study. GX 1078.135; 1078.136. There is no indication in the record that the

CAC's recommendation was followed or that the list was put to any other use.

On the same day that the CAC list was published, the City Council's housing committee referred seven sites to the Council — all but three of the remaining ten from the MHA's original list. GX 1078.129. Two of the sites not referred were East side sites (one on Texas Avenue and another on Sweetfield Circle) that had since been acquired in whole or in part by private developers. GX 1078.130. Six of the sites referred to the Council were in Southwest Yonkers; one (a site on Bronx River Road) was in East Yonkers.

As in previous years, announcement of the sites prompted opposition from civic associations and, with respect to two sites on Garfield and Fillmore Streets (essentially the same RAMP area proposed in 1956), a mass protest rally. GX 1078.144; 1078.145. The opposition was noted at a YURA meeting, with Planning Director Pistone observing that people "all adopt the same attitude: don't put public housing in my backyard," and that they were "not too receptive to explanations." GX 1078.144.

In February of 1967, the City Council held a meeting to vote on the seven sites. As the debate preceding the vote made clear, the Council faced a choice between continued placement of public housing in and around downtown Yonkers, in some of the City's most heavily minority areas, or acceptance of the concept of scattering public housing throughout the City so as not to reinforce economic and racial segregation. In its votes, the Council chose the former. The worst of the sites in terms of immediate proximity to other projects (a site on Palisade Avenue and Carlisle Place) was rejected, but so too were the two RAMP sites in the overwhelmingly white Nodine Hill area of Southwest Yonkers as well as the only site left on the list that was in East Yonkers (the site on Bronx River Road). Another Southwest site (between Stanley and Riverdale Avenues) was deferred to a future meeting, and two sites on Croton Terrace — a heavily

minority area in the Southwest neighborhood known as the Hollow — were approved. GX 1078.151; 1078.152. Two weeks later, the remaining Southwest site (also in an area with a high minority population) was also approved. GX 1078.155. The three sites approved were the same ones that had been recommended ten months earlier by the Council's housing committee but vigorously opposed on the grounds that they presented serious relocation problems and would lead to a further overconcentration of public housing in one area of the City.

During the debate preceding the Council's vote, it was noted that the federal authorities were urging "scattered site" housing, and that the City's urban renewal funds depended upon producing acceptable sites for relocation housing. GX 1078.152. Several councilmen, as well as the newly elected Mayor, James O'Rourke, spoke in favor of scattered site housing generally and the Bronx River Road site in particular. *Id.*; Tr. 790-91 (Wilson); Tr. 7227-30 (King). One councilman stated that the site "does seem to fit what everyone has been looking for," while another declared "we have an obligation to take advantage of it." GX 1078.152. The ward councilmen for both the Bronx River Road and RAMP sites strongly opposed their selection, however, and the final vote on the sites (taken after a recess during which the Council went into closed session) was eight to five against the Bronx River Road site and eleven to two against the RAMP. *Id.*; Tr. 7229-30 (King).

A few weeks after the February vote, the City's Congressional Representative, Richard Ottinger, publicly attacked the sites that had been approved, contending that they would "promote racial and social segregation." GX 1078.158. In May of 1967, HUD notified the City that it would not approve the sites that had been submitted, GX 1078.163, with that notification, the City's Stage II urban renewal project officially came to a halt.

E. The Nature and Effect of the Recurring Pattern of Public Opposition

There is little room for doubt that the pattern of community opposition described above significantly affected the City's site selection for public housing. Despite repeated statements by City officials about the urgency of the City's need for public housing, nine years passed before the City approved a sufficient number of sites to make use of a single year's allocation of public housing units. During that time, the City more than once risked the loss of its funding allocation, and in any event, forfeited the opportunity to apply for additional allocations of federal assistance. Nor did the pattern of delays and disapprovals cease even when HUD made clear that the City's urban renewal programs would not go forward unless acceptable sites were approved and submitted.

In addition, it is clear that the delays were not occasioned by a lack of suitable sites. The minutes of agency meetings repeatedly quote city officials and other on-the-scene observers as stating that the chief source of the City's site selection difficulties was community opposition — a view that is corroborated by the record of approvals and disapprovals for the years in question.

City Council approval was rarely given in the face of organized opposition to a proposed site by area residents or civic associations. Indeed, over the course of eighteen years and the consideration of dozens of sites, it was given only twice. The first such approval (a site on Frederic Street in 1951) took fourteen months to obtain, carried by a single vote, and became a campaign issue in the next election. For reasons unspecified in the record, the site was subsequently abandoned. *See* GX 1058.

The second and only other site which the record shows to have been approved despite organized community opposition is the site of Loehr Court, a 108-unit senior citizen housing project on Western Avenue in Southwest Yonkers (one of the three sites approved by the Council in 1958). The Park Hill Residents

Association sent a letter to the City Council announcing its unanimous opposition to the Western Avenue site, and according to the testimony of former ward councilman William Tully, some 300 residents of his ward attended the site selection meeting. Former councilman Tully testified that he had been "irritated" to have been "put on the spot" in front of his constituents, and he suggested that at least part of the reason for his failure to persuade the Council to reject the site was the fact that he was a Republican on a heavily Democratic Council. Tully Dep. 14-15, 17, 25-26.

Whatever the reason, the Western Avenue site clearly was the exception rather than the rule. With respect to nine of the twelve other sites approved by the Council for public housing during the eighteen years in question, there is no evidence whatever of organized opposition by area residents or civic associations.[25] With respect to two (Stanley/Riverdale and Hawthorne/Riverdale), there is some indication that the sites may have been opposed in the past, but no evidence of current opposition. With respect to the last (Lake Avenue), opposition arose only after the site had been approved, and the site was subsequently abandoned. In contrast, the numerous sites that *were* the subject of organized community opposition were either disapproved by the Council, referred to and left in Committee, or for other reasons, never the subject of formal action by the Council.

Plaintiffs suggest that the reason for the City Council's extreme responsiveness to community opposition was the ward

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[25]The nine sites are: Palisade Avenue (now the site of Schlobohm Houses); the Jefferson-Riverdale urban renewal area (approved for public housing in 1953 but later withdrawn from consideration by the MHA and now the site of the Mitchell-Lama project Phillipse Towers); School Street (now the site of Calgano Homes); the old School 1 site (now the site of Hall Court); Martin Ray Place (now the site of Curran Court); Ashburton/Seymour (now the site of the Kristensen Houses); Garden Street (now the site of Walsh Houses); and the two sites on Croton Terrace (rejected by HUD in 1967).

system under which the City Council operated, and in particular what plaintiffs contend was an unofficial "councilmatic veto power" held by ward councilmen over matters of importance affecting their wards. While a description of the phenomenon as a "veto power" suggests a greater formality and certainty than appears to have obtained, it is indeed clear from the evidence for these, as well as subsequent years, that the support of the ward councilman generally was, and was perceived to be, critical to a site's prospects for approval by the City Council. Numerous past and present City officials, including councilmen themselves, testified to the existence of a strong tendency to defer to the views of the ward councilman. Alfred Del Bello, for example, who was a councilman from 1966 to 1969 and Mayor of Yonkers from 1970 to 1973, testified that the ward councilman was "normally allowed to lead the issue" in matters affecting his ward, and that as a result City officials tended to consult the ward councilman to determine whether or not his support could be obtained for a project. Tr. 1178-79. Without that support, according to Del Bello, "it was usually much more difficult to get approvals out of the Council." *Id.; see also* Tr. 1180-86; 1192-93. Walter Webdale, the Director of YURA from 1967 to 1971, likewise acknowledged that it was "difficult to conceive" of getting Council approval for a subsidized housing site without having the support of the ward councilman, and Morton Yulish, the City's Director of Development from 1971 to 1974, characterized that fact as an "unwritten rule" which was "very clear to all who worked with the City Council." Webdale Dep. 186; Tr. 858-60 (Yulish); *see also* Tr. 987-88 (Iannacone); 1666-70 (O'Rourke); 1869 (Schneider); 2813-14 (Arcaro).

In addition, numerous councilmembers acknowledged that their own position with respect to sites proposed for subsidized housing in their wards was, in turn, strongly influenced by the views of their constituents. Some explained it on the basis of a belief that people had a "fairly good right to determine" what they would see when they looked out their windows. *See, e.g.,*

Tr. 1676-78 (O'Rourke). Others suggested, more pragmatically, that they viewed their prospects for re-election as depending upon it. *See, e.g.*, Cola Dep. 80-81; Tr. 992-93 (Iannacone); *cf.* Tr. 1874-77 (Schneider); Webdale Dep. 484. And there is abundant evidence that their constituents encourage that view. *See, e.g.*, Tr. 1197-98 (Del Bello); P-I 106-26 (GX 1063.13).

It is true, as the City has emphasized, that a number of the sites rejected during these years were disapproved by the Planning Board as well as the City Council, or were never presented to the Council after their disapproval by the Planning Board. But even with respect to those sites, there is reason to conclude that community opposition, and its effect on the City Council, played a major role in their rejection. With respect to the influence of a Planning Board disapproval on a subsequent City Council vote, the record suggests that the Council's reliance on the views of its Planning Board was selective. When a Planning Board disapproval was accompanied by community opposition (as it was, for example, in the case of sites on St. Nick's Oval and Bronx River Road), the City Council tended to likewise disapprove the site. When a Planning Board disapproval was not accompanied by community opposition, however, (as in the case of the School Street site in 1958), the City Council was willing to override even a strong vote of disapproval by the Planning Board.

Moreover, the Planning Board itself was not immune from lobbying by area residents or their representatives. At the first sign of community opposition, a council committee was formed to meet with site selection agencies and to "let the public know that the Council [had] an interest" in site selection. GX 1204.4. Ward councilmen also regularly appeared at site discussion sessions of the MHA and the City Planning Board or wrote to the agencies to report on the reaction of the neighboring community to a proposed site. *See, e.g.*, GX 1058.36; 1204.4; 1204.13; 1059.6; 1063.8; 1078.15. In addition, area residents and civic associations also contacted the Planning Board and other site selection agencies

directly. Copies of resolutions and petitions in opposition were routinely sent to the Planning Board, and groups also appeared in person to speak against particular sites. *See, e.g.*, GX 1058.6; 1059.1; 1059.7-1059.9; 1060.14; 1060.38; 1069.10; 1078.17-1078.19.

To be sure, the record contains evidence that planning criteria — that is, factors such as cost, zoning, the physical suitability of the site, future plans for the area in general or the site in particular, availability and adequacy of public facilities such as schools, shopping, transportation, etc. — were regularly discussed by the MHA and the Planning Board and sometimes stated as the basis for their decisions. The record also contains abundant evidence, however, that these agencies were acutely aware of the requirement of Council approval, and of the unlikeliness that the approval would be forthcoming if there was significant community opposition to a site. *See, e.g.*, GX 1059.2; 1059.4; 1059.14; 1062.1; 1062.4; 1063.4; 1063.8; 1063.10; 1063.17; 1064.19; 1064.20; 1078.110; 1078.117; 1204.7; 1204.18. Moreover, with respect to some sites (for example, the Bronx River Road and Texas/Georgia Avenue sites proposed in 1965) no reasons apart from community opposition were offered at the time of their disapproval by the Planning Board. GX 1078.28.

In addition, the *pattern* of Planning Board approvals and disapprovals further suggests that the presence or absence of community opposition was an important factor in the decision-making process. With respect to East side sites, most notably, the Planning Board's decisions (like the City Council's) follow a general pattern in which the sites that were disapproved were ones that prompted opposition from area residents and civic associations, *see* GX 1059 (Coyne Park, Raybrook Road, Midland Avenue); GX 1060 (St. Nick's Oval, Ridgeview Avenue); GX 1078 (Bronx River Road, Sweetfield Circle, Texas/Georgia Avenues), and those that were approved were ones for which there is no evidence of such opposition. *See* GX 1063 (old School 1 site,

Martin Ray Place). The single exception to the pattern was the Smart Avenue site, which Planning Director Pistone characterized as "ideal," and which the Planning Board approved notwithstanding the objections of the ward councilwoman. But the site ceased to be an exception when it came up before the Council itself, where it was rejected.

The sites that generally escaped community opposition, and thus successfully emerged from the site selection process, are heavily concentrated in the downtown area of Southwest Yonkers. *See* Appendix A. Indeed, more than half of the total public housing units built during those eighteen years (713 units out of a total of 1,365) were concentrated in two adjacent Southwest projects (Schlobohm Houses and Walsh Gardens) which in turn were only a few blocks away in one direction from the 800 units of public housing contained in Mulford Gardens and Cottage Place Gardens (the two projects built in the 1940's), and a few blocks away in the other direction from the 278 public housing units contained in Calgano Homes (the School Street project approved in 1958). Thus, by 1963, more than 80% of the City's existing or planned public housing was located within a several-block area of Southwest Yonkers. Yet, despite this extreme concentration of public housing units in one area of the City, the additional sites that were approved in 1966 and 1967 (but rejected by HUD) were all located near that same area.

The City has sought to explain this extreme concentration as the result of a plan to use public housing to rebuild the Southwest Yonkers. In this regard, the City places chief reliance upon a series of Master Plan Reports published by its Planning Department in the late 1950's and 1960's. C-1504; C-1505; C-1506. Those reports, however, do little more than confirm an undisputed fact: that Southwest Yonkers was the area in greatest need of urban renewal. The reports in no respect recommend concentrating the City's public housing in and around the downtown area of Southwest Yonkers. In fact, the Yonkers Central Business

District (CBD) Study, published in June of 1959, expressed concern about the "lower family income concentrations in the immediate periphery of the CBD." C-1503. And the Land Use and Community Facilities Plan, published in June of 1961, specifically called for a mix of income levels to be represented in the residential portion of the Southwest's redevelopment. C-1505.

The City has suggested that its planners viewed public housing as the only mechanism available to the City to initiate redevelopment on slum clearance sites and thus pursued a plan of using public housing as the "seed investment" to attract the other development contemplated by the Master Plan. But that argument is not supported by the record.

Neither the Planning Department's recommendations, nor its approvals, were limited to sites in Southwest Yonkers. Indeed, the first and only consistent proponents of the view that public housing should be restricted to the "blighted areas" of Southwest Yonkers were not City officials at all, but civic associations protesting sites that had been proposed in their own neighborhoods. *See, e.g.,* GX 1058.6; 1058.102; 1069.11. In contrast, the Planning Department's first, and apparently only, detailed position paper on public housing for this period — a "proposed methodology for site selection" issued in May of 1950 — targeted neither the Southwest nor areas of blight as the only appropriate sites for public housing. GX 1058.16. In fact, one of the specific sites recommended in the report — a site at Palmer Road and Stratton Street — was in an unblighted (and overwhelmingly white) area of Central Yonkers just west of the Saw Mill River Parkway. *Id.; see also* GX 1225.41; C-1805A. For reasons that are not apparent from the record, the site was never pursued.[26]

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[26]The other two sites proposed in the report (Park Hill/Van Cortlandt Park Avenues and Sullivan Oval) were likewise in overwhelmingly white and unblighted areas and likewise were never developed with public housing. Both sites encountered strong community opposition, and they advanced no farther than

(Footnote 26 continued on next page)

Nor were many other of the Planning Department's initial or subsequent recommendations adopted. As noted earlier, for example, the 1950 report recommended that public housing projects be limited to 250 units so as to "reduce their impact" on the surrounding area — a recommendation that was abandoned by City officials when it became apparent that the City was suffering from a shortage of "politically suitable" sites which was at least as serious as its need for public housing. *Cf., e.g.,* GX 1062.4. Likewise disregarded was the Planning Board's strong opposition to the selection of sites that would prevent construction of a proposed arterial route which the planners considered to be critical to the eventual revitalization of the City's CBD.

Nor, certainly, can the sites selected in 1965 and 1966 be explained on the basis of any plan to use public housing to revitalize the Southwest. The chief criterion for sites during those years was "universally accepted" to be that the sites be vacant so as to add to the City's supply of relocation housing and avoid any further reduction or loss of federal urban renewal assistance. GX 1078.67; *see also, e.g.,* GX 1078.8. Yet, vacant and properly zoned sites in East Yonkers were rejected in favor of four Southwest sites which posed significant relocation problems of their own and which were rejected on that ground (among others) by HUD. Far from contributing to efforts to revitalize Southwest Yonkers, the City's choice of sites brought those efforts to a halt.

(Footnote 26 continued from previous page)

the Planning Board's recommendation. *See* GX 1058; 1059; *see also* HOUSING II.B *supra.*

The 1950 report speaks generally of the desirability of "coordinating" public housing construction with slum clearance and urban renewal but clearly does not equate such coordination with building only in or around downtown Southwest Yonkers. Nor does the evidence suggest that further study of planning principles or federal policy led the Planning Department to subsequently adopt that view. Indeed, as noted earlier, the minutes of a 1962 Planning Board meeting quote Planning Director Pistone as advocating dispersion of subsidized housing and being told that his view was "interesting" but politically impractical — following which exchange, the Planning Board voted to reverse a prior disapproval of a further addition of subsidized housing to the downtown area. GX 1064.19; *see also* HOUSING III.C *supra.*

It is, in short, difficult to discern any plan at work in the City's site selection process during these years, except for an apparent determination to avoid, at virtually any cost, a confrontation with community opponents of public housing.

There is also considerable evidence to suggest that this community opposition was based, at least in part, upon the race of the potential occupants of public housing. Indeed, with respect to the years from 1965 to 1967 (as will be the case with respect to future years as well) there is scarcely any basis for doubt that race was a factor in the opposition. City officials themselves publicly identified the issue before them as being whether the residents of Yonkers were "ready" for the economic and racial integration being urged upon the City by HUD, by groups such as the NAACP and the Council of Churches, and by one of YURA's own citizen's committees — the Relocation and Minority Housing Subcommittee of the Citizens' Advisory Committee. *See generally* GX 1078; *see also* HOUSING III.D *supra*.[27] Moreover, Alfred Del Bello, one of the City officials closely involved in those events, acknowledged at trial (as did other City officials involved in the events of subsequent years) that his constituents equated public housing with minorities, and that race was "definitely" a factor in much of the opposition that arose during the site selection process. Tr. 1194-97 (Del Bello); *see also* Tr. 7237-38 (King).

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[27]The City has noted that the grounds specified in HUD's final letter rejecting the 1967 sites did not mention (as did its preliminary letter on the Hawthorne/Riverdale site) the problem of "potential concentration of minority groups." *Compare* GX 1078.163 *with* 1078.94. Instead, the grounds specified by HUD for the rejection were merely that acquisition costs were too high (causing the projects to be either economically infeasible or unacceptably dense), and that the sites (all of which were occupied) promised to exacerbate rather than alleviate relocation problems. GX 1078.163.

However, the City has cited no evidence which suggests that City officials interpreted the omission as a retreat from HUD's previous indication that at least some dispersion of subsidized housing was called for in order to avoid concentrating minorities in one area of the City.

The evidence for the years preceding 1965 is decidedly less dramatic. But even with respect to those years, there is considerable evidence suggesting that race was at work in the sustained community opposition that existed to the placement of public housing in any but a few areas of the City. As an initial matter, the pattern of opposition itself strongly suggests a racial influence. Sites proposed in East or Northwest Yonkers, or the heavily white areas of Southwest Yonkers, almost invariably prompted strong community opposition. Sites proposed in the more heavily minority areas generally did not.[28] In addition, the exceptions to the pattern tend to reinforce, rather than weaken, the inference to be drawn. The few sites in white areas that prompted little or no opposition were for senior-citizen or middle-income (Mitchell-Lama) housing, whose occupants were more likely to be heavily white. *See, e.g.,* Tr. 878-80 (Yulish); 994-95 (Iannacone). Indeed, the distinction between low-income and middle-income housing is particularly well illustrated by the remark of a City official recorded in the minutes of a YURA meeting in 1966. Amid a discussion of the need to prompt the City Council to take action on the public housing sites that were still buried in committee, George Piantadosi observed that it was now possible to place public housing tenants in Mitchell-Lama units, and that the way to get the Council to produce sites for public housing was to tell it that they planned to do so. GX 1078.44; *see also* GX 1078.23; 1078.66.

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[28]The City has repeatedly emphasized with respect to various sites that they were not in areas that were "predominantly minority." That observation means little, however, with respect to a City in which, as late as 1960, the citywide minority population was only 4.5% and only a handful of census blocks outside of Runyon Heights were "predominantly" (*i.e.,* more than 50%) minority. GX 1225.1.

A series of maps introduced by plaintiffs, which show minority concentration on a block by block basis, vividly illustrates the extreme degree to which the sites selected for subsidized housing tended to be in the more heavily minority areas of the City. *See* GX 1225.41; 1225.42; 1225.44; 1225.45.

To be sure, there is little evidence of overtly racial statements by opponents of public housing. And former councilman Edward O'Neill, who strongly and successfully opposed three sites proposed in his east side ward in 1953, testified that he believed race played no role in site selections because "nothing was ever expressed for the record to indicate that it did play a role." O'Neill Dep. 102. The former councilman went on to acknowledge, however, that racial opposition was "certainly. . .nothing anybody would put into words." *Id.* at 189.

Nor is direct evidence of a racial influence wholly lacking. At least one group of citizens expressed concern in 1958 about having to "absorb the overflow from Harlem or Puerto Rico." P-I 106-26 (GX 1063.13). And during at least one Planning Board meeting that same year the Secretary-Director of the MHA expressly stated that some of the sites under discussion could be expected to prompt objections on grounds of race. GX 1063.8.

Moreover, beginning with the very first sites proposed, a common theme in the objections has been concern about declining property values, the "deterioration" of the neighborhood, the undesirable "element" attracted by public housing, and insistence that public housing properly belonged in "blighted areas," not "residential communities." *See* HOUSING III.B through III.D *supra*. Such objections in and of themselves may not be sufficient to indicate that a racial influence was at work. However, when those objections are combined with a pattern of opposition that also suggests a racial influence, it becomes significantly harder to accept the argument that the concerns were purely economic.

It becomes harder still when, as here, there is also evidence that although Yonkers had, until the mid-1960's, a relatively small and stable minority population, GX 1225.1, it was very much a racially divided city. In this regard, it is noteworthy that Runyon Heights was not created or maintained as a black enclave merely by chance or "associational preferences" that were unrelated to racial discrimination. According to the City's long-time

Planning Director, Philip Pistone, the neighborhood was founded on a large tract of land owned by a state senator who regularly brought busloads of residents from Harlem there for weekend picnics, during which he would auction off parcels of the land. Tr. 9508-09 (Pistone). As the neighborhood developed, any contact with the overwhelmingly white Homefield area immediately to the north was severely discouraged when the Homefield Neighborhood Association purchased and maintained a four-foot strip of land as a barrier between the streets of the two neighborhoods. Tr. 2740-42 (Downes); *see also* SCHOOLS IV.A.3.a *infra*. And the objections raised by Runyon Heights residents to the first site proposed there for public housing in 1956 make clear that the area was perceived to be the only one open to blacks in East Yonkers. *See* GX 1060.12, 1060.16. While this history does not, of course, warrant any general presumptions about the subsequent acts of City officials, it does markedly increase the significance of the fact that the only site selected for family public housing which is not in Southwest Yonkers is in Runyon Heights.

Similarly noteworthy are the circumstances surrounding the construction of Cottage Place Gardens, the City's second public housing project. In apparent response to concerns expressed in the late 1930's by community leaders about the difficulties blacks were encountering in obtaining decent and affordable housing in the private market, the City resolved to build a public housing project "for Negroes" and set about finding a suitable site on which to do so. *See* GX 1053. Various sites were rejected on the ground that the level of minority concentration there was not sufficiently high, and the site eventually selected in 1940 was in one of the most heavily minority areas of Southwest Yonkers. GX 1225.41; P-I 360.

The significance of Cottage Place Gardens is twofold. First, the circumstances surrounding its construction suggest that private market discrimination played a major role in maintaining the pockets of minority concentration which existed in Southwest

Yonkers through the mid-1960's (when those pockets of concentration began to expand significantly), and that the City officials were well aware of that discrimination. And in this regard, what is suggested by Cottage Place Gardens is decisively confirmed by the credible testimony of various Yonkers residents, as well as that of the City's former Director of Relocation, and by contemporaneous City documents describing the extreme difficulty that minorities had in finding relocation housing when they were displaced by urban renewal. *See, e.g.*, Tr. 428-56 (Smith); 527-29 (Gibson); 2333-43 (Stores); 1933-95 (Trommer); GX 1068.1; 1068.3-1068.4; 1068.11; *see also* GX 1068.5.

In addition, with respect to the actions of City officials, the history of Cottage Place Gardens illustrates what would otherwise be merely a matter of common sense: that City officials were fully capable of comparing the relative minority concentration of various parts of the City, and of the Southwest, and then choosing a site that would best preserve existing patterns of segregation.

Once again, it bears emphasis that the history of Cottage Place Gardens does not, of course, automatically taint any subsequent actions taken by the City. However, with respect to the extreme degree to which the City's subsequent site selections in fact conformed to community pressures, and the extreme degree to which those pressures in fact followed a racially identifiable pattern, the history of Cottage Place Gardens together with the other evidence presented regarding private market discrimination and its acknowledged effect on minority relocation opportunities — strongly diminishes any likelihood that those phenomena were merely coincidental and unrelated to an intent to preserve existing patterns of segregation.[29]

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[29]The plaintiffs have included Cottage Place Gardens, as well as Mulford Gardens, the City's first public housing project (the site for which was selected in 1939) as part of their allegations of a pattern and practice of racial discrimination by the City in the siting of subsidized housing in Yonkers. With respect to Mulford Gardens, however, there is virtually no evidence before us

(Footnote 29 continued on next page)

IV. THE RIVERVIEW PERIOD

In sharp contrast to the preceding eighteen years, the period from 1968 to 1972 was a highly productive one for the development of subsidized housing in Yonkers. Sites were approved for fifteen subsidized housing projects for families (totalling 2,647 housing units) and two subsidized housing projects for senior citizens (totalling 290 housing units). Most of the sites were approved during the years of 1970 and 1971. All seventeen sites were in Southwest Yonkers.

It is clear from the record that this productivity was attributable in large part to a series of conscious decisions on the part of City officials to concentrate, at least for the present, on sites which were "politically feasible." It is equally clear that sites outside of Southwest Yonkers remained politically infeasible because of continuing opposition to subsidized housing on the

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regarding the circumstances of its site selection, and thus the City's actions in that regard do not form part of the basis upon which we find the City to be liable for racial discrimination.

Nor, although we consider the question to be a closer one, do we believe it proper to view Cottage Place Gardens as the starting point of the pattern of discriminatory actions that so clearly followed. The City's actions concerning Cottage Place Gardens are significantly isolated in time, and distinguished in circumstances, from the pattern that later arose. Indeed, with respect to the former point, it bears particular emphasis that the City appears to have abandoned the overt designation of "Negro housing" as early as 1941 and, so far as the record before us indicates, made no attempt to maintain a segregated occupancy in either Mulford Gardens or Cottage Place Gardens. *See generally* GX 1052; 1053. The initial circumstances surrounding the construction of Cottage Place Gardens seem to us to be more an isolated vestige of an earlier and discredited era, than a part of the pattern and practice of actions for which the City may today be held liable.

Nonetheless, as we have noted, the circumstances surrounding the construction of Cottage Place Gardens remain relevant for the light they shed on subsequent actions taken by the City. And the location of Cottage Place Gardens remains relevant to any calculation of the effect of the City's subsequent actions. Indeed, in view of that fact, the question of whether Cottage Place Gardens can be properly included in the basis of the City's liability may be chiefly an academic one. *See* fn. *71 infra.*

part of area residents and civic associations — an opposition based, at least in significant part, upon fear of an influx of minorities into what were (and remain today) overwhelmingly white neighborhoods.

A. Overview of Projects Approved

During the years in question, City officials largely abandoned reliance on the construction of public housing as a relocation resource, and turned instead to the subsidized housing programs known as § 221(d)(3) B.M.I.R. and § 236 housing. Under these programs the housing was constructed, owned, and operated by not-for-profit sponsors rather than a local housing agency. The sponsors received a low-interest mortgage that was subsidized and often insured by HUD, and were required, in return, to observe rental and income-limit schedules established by HUD. The guidelines were targeted for moderate-income households, but additional rental subsidies were available to make some or all of the units accessible to low-income households as well. Since the projects were required to be self-sustaining, tax abatements from the local government were generally needed in order to make the projects financially feasible.

All fifteen of the projects for families approved during this period were § 221(d)(3) B.M.I.R. or § 236 projects. Eight were sponsored by private non-profit or limited-profit groups; the remaining seven were sponsored by the New York State Urban Development Corporation ("UDC"), a public benefit corporation created by the New York State legislature in 1968 to participate in housing, commercial, and industrial development throughout the state.

The seven UDC projects were constructed pursuant to written agreements ("Memoranda of Understanding") between the City and the UDC, which were authorized by the City Council and executed on behalf of the City by the City Manager. Five of the seven projects (totalling 1,201 units of housing) were con-

structed pursuant to a single Memorandum of Understanding authorized and executed in July of 1970. The five projects are Frazier Homes (21 units) at the intersection of Warburton and Lamartine Avenues; the Dorado (188 units) at the intersection of Warburton and Ashburton Avenues; Whitney Young Manor (195 units) near the intersection of Nepperhan and Ashburton Avenues; and Riverview I (454 units) and II (343 units) on Riverdale Avenue in the City's Stage II urban renewal area. The sixth UDC project, the 300-unit Seven Pines, was constructed pursuant to a Memorandum of Understanding approved in June of 1971 and is located on Glenwood Avenue at the foot of Trevor Park. The seventh and final UDC project, the 310-unit Parkledge Apartments, was constructed pursuant to a Memorandum of Understanding approved in June of 1972 and is located on Yonkers Avenue, immediately west of the Saw Mill River Parkway.

The eight privately sponsored § 221(d)(3) and § 236 projects for families, which were largely the result of recruiting efforts by the director and staff of YURA, *see* HOUSING IV.C.1 *infra*, were constructed pursuant to City Council resolutions which granted the sponsor a substantial tax abatement in return for an agreement to give preference in both initial and subsequent rentals to persons displaced by urban renewal projects. The first such resolution was passed in January of 1968 for Jefferson Terrace, a 64-unit project between Highland Avenue and Jefferson Street. GX 1079.25. The next was Highland Terrace (96 units), a few blocks to the south, approved in July of 1968, C-453, followed by 10 Orchard Street (a 8-unit rehabilitation) in April of 1970, GX 1147.10; Messiah Baptist (130 units) on Highland Terrace in May of 1970, C-552; Waverly Arms (28 units) on Waverly Street in October of 1970, C-561; 164-170 Buena Vista Avenue (a 12-unit rehabilitation) in March of 1971, C-534; Cromwell Towers (317 units) at Locust Hill Avenue and Cromwell Place in July of 1971, C-747; and Jackson Terrace (181

units) on Riverdale Avenue south of Vark Street in November of 1971, C-509.

The remaining two projects approved during this period were senior citizen projects. Flynn Manor, a 140-unit public housing project on Riverdale Avenue at Post Street, was approved by the City Council in June of 1970, C-102; and Father Finian Sullivan Towers, a 150-unit Mitchell-Lama project, received preliminary approval in November of 1970, GX 1099.11, and final approval in October of 1973. GX 1099.19.

B. The Continuing Opposition to Subsidized Housing in the City's Heavily White Neighborhoods

For sixteen of these seventeen projects, there is little or no evidence of community opposition prior to the project's approval by the City Council. Only Parkledge — the final UDC project — appears to have encountered any significant community resistance. There is, however, abundant evidence of continuing community opposition to subsidized housing in certain areas of Yonkers. The opposition is, as before, evident in the heavily white areas of the City, particularly those east of the Saw Mill River Parkway. The sites approved by the City are, without exception, west of the Saw Mill River Parkway, and with three exceptions, in the more heavily minority areas of the Southwest. GX 1225.44. The exceptions are the two senior citizens projects (both of which appear to have been heavily white since opening, C-1650), and Parkledge, which is located immediately west of the Saw Mill River Parkway, and which was chosen in response to insistence by HUD that the City select a site outside of areas of minority concentration.

As before, there is relatively little evidence that the residents of the City's heavily white areas expressly mentioned race as a reason for opposing subsidized housing in those areas. *But see* HOUSING IV.C.3 *infra*. Nonetheless, there can be no serious doubt that the opposition was, on the whole, racially influenced,

Numerous former city officials — including those directly involved in the selection of sites for subsidized housing during this period — acknowledged at trial that they themselves believed the opposition they encountered was indeed based, at least in part, upon race. *See* Tr. 1193-97, 1378-79 (Del Bello); 875-80; 1066-67 (Yulish); Webdale Dep. 487-88; 497-98; Tr. 983-86, 994-95 (Iannacone); 2792-94, (Arcaro); 1861-67 (Schneider).

As noted earlier, former East side councilman and Mayor Alfred Del Bello, testified that his constituents equated subsidized housing with minorities, Tr. 1197, and that "race was definitely a consideration in many of the demonstrations and visible opposition we had." Tr. 1194.

Walter Webdale, the Director of YURA from the spring of 1967 through the fall of 1971, testified more guardedly but to the same effect. Webdale acknowledged that the high level of emotion which prevailed at public meetings on subsidized housing was characteristic of issues that are "racially tinged." Webdale Dep. 487-88; 497-98. "At many meetings, there was no logic left to the meeting," Webdale explained, "and so one would have to assume there was something more than the size of the street, the water, the sewer, etc." *Id.* at 498. Webdale also testified that there was "tremendous fear" about subsidized housing in Yonkers, which was overcome in "some areas" but not in others, *id.* at 336-37; 562, and he cited the approval of the Parkledge project in 1972 as an example of one case in which that fear was overcome. *Id.* at 338.

Morton Yulish, who was the Administrator of the City's Department of Development from the fall of 1971 to early 1974, and who in 1971 and 1972 led the efforts to obtain City approval for a site outside areas of minority concentration, testified that he encountered intense opposition to subsidized housing in East Yonkers; that he believed the opposition to be based, at least in part, upon race; and that he shared his views on the subject with Mayor Del Bello and City Manager Seymour Scher. Tr. 1066-67.

Yulish testified that the issues raised "on the surface" were generally whether tax abatements should be granted outside of urban renewal areas; whether the "residential character" of single-family neighborhoods should be changed; and whether the federal government should be permitted to control what would happen in the City's neighborhoods. *Id.* at 875. However, Yulish considered those issues often to be "smokescreens" for underlying racial fears, *id.* at 875-80, and he testified that at many meetings, the issue of race was "very thick in the air." *Id.* at 1066-67. "The bottom line," according to Yulish was that "there was no way that you could . . . get public support, and then after the fact get councilman support, to build large-family, predominantly black assisted housing on the other side of the [Saw Mill River] Parkway." Tr. 879-80.

Both Yulish and Gregory Arcaro, a planner with the City from 1968 to 1970 and from 1972 to 1980, further testified that many of those who lived in East Yonkers had moved there from the Bronx and other areas of New York City, and had expressed strong fears that subsidized housing would lead to the same "deterioration" which they had sought to escape. Tr. 2792-93 (Arcaro); 1064-67 (Yulish); *see also* McLaughlin Dep. 77-78. In addition, there is evidence of a widespread belief that part of the reason for the sharp rise in the City's minority population from the mid-1960's on was an influx of minorities displaced by the urban renewal that had taken place in White Plains. *See, e.g.*, Tr. 841-45 (Yulish); 1728-33 (O'Rourke). As a result, according to Yulish, some people in Yonkers equated urban renewal with "large infusions of minorities into a city ill-equipped to cope with them," Tr. 843, and they were uninterested in pursuing urban renewal unless they could "get even" by sending the people displaced by urban renewal back to White Plains. *Id.*

David Bogdanoff, a builder who worked closely with City officials on a number of subsidized housing projects during these years, characterized racially influenced opposition to subsidized

housing as simply a "fact of life at that time" in most predominantly white communities. Tr. 10,224. Bogdanoff testified that there was a "tremendous fear" in East Yonkers (as in most predominantly white communities) that placing subsidized housing there would result in an invasion of minorities, and that "of course" it influenced where he could build. Tr. 10,224-25; *see also* 10,197-99; Logue Dep. 112. In fact, Bogdanoff volunteered that if he had attempted to tell the residents of any heavily white community that construction of subsidized housing need not result in an invasion of minorities, he "would have been howled down with laughter." Tr. 10,197.

C. The Pattern of Opposition and Apparent Acquiescence

The pattern of sites selected during this period, and the circumstances under which they were selected, taken together with the testimony described above, strongly suggests that City officials likewise came to view racially influenced opposition to subsidized housing in East Yonkers as a "fact of life," and came to view acquiescence in that fact of life as the price of urban renewal in Yonkers.

1. The City's Campaign to Produce Privately Sponsored Projects

When Walter Webdale arrived in Yonkers in April of 1967 as the first permanent director of the Yonkers Urban Renewal Agency, he found the City's Stage II urban renewal project at a standstill due to an inability to provide relocation housing. For the past eighteen years, community opposition to public housing had seriously hindered site selection and had effectively ruled out sties in all but the most heavily minority areas of the City. Two months before Webdale's arrival, amid typically strong community opposition to several sites proposed in East Yonkers, the City Council had rejected all proposed sites except for several located in the heavily minority downtown area of Southwest Yonkers. Those

sites, in turn, were rejected by HUD one month after Webdale's arrival. *See*, HOUSING III.D *supra*.

Webdale's first task thus became the removal of the "road block" that the lack of relocation housing presented to the Stage II urban renewal project, GX 1079.4, and he responded by undertaking an extensive campaign to bring about the construction of § 221(d)(3) and § 236 projects. *See, e.g.*, GX 1079.8; 1079.17; 1079.26; 1080.14; 1081.8; 1082.1; 1086.6; 1207.3; Webdale Dep. 72, 89-90; Tr. 10,182-83 (Bogdanoff). Webdale and his staff at YURA located sites, solicited sponsors, and provided the sponsors with a broad range of technical and political support, including assistance in preparing applications to HUD, *see e.g.*, GX 1079.18; 1082.2; 1083.9; and submissions to the City Council, *see e.g.*, GX 1079.34; 1079.53; 1083.32; planning and construction design, *see, e.g.*, GX 1079.52; 1083.11; 1084.5; and meeting with federal, city and school officials, *see, e.g.*, GX 1079.45; 1083.31; 1083.32; 1084.1.[30] Although Webdale looked at sites outside of Southwest Yonkers, and although his office publicly stated that projects were expected to be built "on scattered sites in various parts of the city," GX 1079.61a, Webdale limited his efforts at recruiting sponsors for § 221(d)(3) and § 236 projects to Southwest Yonkers. *See, e.g.*, Webdale Dep. 56-58, 137-38, 243-44.

So limited, site selection and approval proved far less difficult than in previous years. Although the minority and other community groups continued to press for scattered-site housing, *see* HOUSING IV.D.3 *infra*, and although concerns continued to be raised about the increasing concentration of subsidized housing in the Southwest, *see* HOUSING IV.D.4 and 5 *supra*, the sites

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[30]Indeed, with respect to the design and management of the projects, the City's involvement can be characterized not merely as lending a significant degree of assistance, but also as exercising a signficant degree of control. *See, e.g.*, GX 1079.24; 1079.30; 1079.52; 1082.32; 1083.11; 1083.32; 1084.5; Webdale Dept. 186-88.

designated for the § 221(d)(3) and § 236 projects prompted little apparent opposition from area residents (indeed, some were actively supported by area residents, *see* HOUSING IV.D.3 *infra*), and they were approved without incident by the City Council.

2. The Candeub & Fleissig Survey and the City's 1970 Memorandum of Understanding with the UDC

In 1969, while the campaign to produce privately sponsored projects was underway in the Southwest, a citywide vacant land survey, jointly commissioned by the City, the Yonkers Chamber of Commerce, and the UDC, was made public. The result, as in previous years, was immediate and apparently effective opposition from the residents of East and Northwest Yonkers. The survey was summarily abandoned, and sites in the downtown area of Southwest Yonkers were designated soon thereafter for five subsidized housing projects (totalling 1,200 units) to be sponsored by the UDC.

The survey in question arose as part of the City's efforts to persuade the Otis Elevator Company, one of the City's largest employers, to remain in Yonkers. Otis had indicated that it needed either to expand its existing facilities or relocate elsewhere, and in 1968 the City asked the newly created UDC for assistance in its efforts to retain Otis. C-579.

Among the areas in which the City sought assistance was in the relocation of some 1,000 predominantly minority families from the riverfront area designated for the Otis expansion. *Id.*; GX 1096.47. To that end, the UDC, the City, and the Yonkers Chamber of Commerce hired the consulting firm of Candeub & Fleissig to identify "available sites within the City for the construction of low and moderate income housing . . . [with] special attention . . . to the potential development of open land sites." C-592.

In May of 1969, Candeub & Fleissig produced a list of ninety-eight vacant sites in Yonkers, and a ranking of those sites according to their feasibility for the construction of subsidized housing. GX 1096.50; P-I 150-80. Twenty-two of the ninety-eight sites were in Southwest Yonkers; the remaining seventy-six were scattered throughout East and Northwest Yonkers. GX 1225.43. With the assistance of Planning Director Philip Pistone, eleven sites were designated for further study. Tr. 9768, 9872 (Pistone); GX 1096.60.

Word of the Candeub & Fleissig survey quickly reached the City Council. Alfred Del Bello, who was at that time the Democratic candidate for Mayor as well as the tenth ward councilman, called upon Walter Webdale "to supply our local news media with a map of all proposed sites or an explanation of why they are being kept secret. GX 1096.56.

On June 5, the local press published a description of eleven sites, and reported that the list had been obtained from a map in YURA's offices which bore the legend "Sites architecturally feasible for low and middle income housing." GX 1096.60. Four of the sites were in, or on the border of, Southwest Yonkers; the remaining seven were spread across Northern Yonkers. GX 1225.43; 1096.60.

Publication of the list created an uproar in Yonkers. *See, e.g.*, Tr. 9870 (Pistone); 1703 (O'Rourke), GX 1096.98. Adding to the concern was the knowledge that the UDC's state charter gave it the power to condemn land and override local zoning ordinances, thus potentially removing control over site selection from local bodies such as the City Council. Tr. 1703 (O'Rourke).

On June 10, Mayor James O'Rourke issued a statement in response to "recent articles in the press relating to 'scattered site housing,' stimulated by public officials for unworthy political reasons and calculated to pander to public fear and agitation." GX 1096.63. The Major emphasized the importance of the Otis

expansion project to Yonkers, and explained that "[a]s in all projects such as these, to break the bottleneck of initial relocation, several sites of decent housing will be required outside the project areas." *Id.*

The Mayor added, however, that no site proposals had, as yet, been made, and indicated that in determining site feasibility, "profound consideration" would be given to "maintaining the integrity and character of neighborhoods"; "maintaining the integrity of property values"; and "preserving the integrity of needed parks and recreation land." *Id.* The Mayor closed his statement with the assurance that public hearings and discussions would be held before any sites were selected. *Id.*

A petition in opposition to the sites located in Northeast Yonkers was sent to the Mayor, the City Council, and the Planning Board. GX 1096.65. The grounds for opposition listed in the petition were that subsidized housing projects would have a detrimental effect on property values and "could blight the areas"; would violate existing zoning laws; would take away needed park and recreational lands; and would overtax school and transportation facilities. *Id.* The petition called for "public hearings . . . on notice" before any action was taken on the sites, and declared in closing that:

> It is reliably reported that these sites and the others mentioned in The Herald Statesman of June 5, 1969, are part of a proposed program for use of state funds to transfer N. Y. City residents into suburbs. If that is advisable it could be accomplished better by not creating conflict with or downgrading existing established residential areas.

Id.

A meeting was held on June 12 between City officials and the UDC. The following day, the press reported that according to Mayor O'Rourke, the UDC had said that it would refrain from imposing specific sites on Yonkers but would "pull out" of the

renewal project unless "scattered sites" were selected. GX 1096.66.

Two days later, some 500 residents of the fifth ward in East Yonkers appeared at a meeting with City officials to protest the sites identified in their area. GX 1096.71; Tr. 1711 (O'Rourke). According to press accounts, the City officials in attendance included fifth ward councilman Andrew O'Rourke; Mayor O'Rourke; and Mayoral candidate Del Bello. All three sought to reassure the audience that the matter of site selection would be given careful study by the City Council, and that use of the UDC's power to override zoning laws would be resisted. *Id.* Del Bello, in particular, called upon the UDC to leave the selection of sites to the City Council in order to "put the citizens' minds at ease." *Id.* The meeting also resulted in the formation of a Citizens Committee, led by Councilman O'Rourke, to study the sites identified in the Candeub & Fleissig study.

On June 17, the UDC sent a telegram denying that it had threatened to pull out of the renewal project if scattered housing sties were not selected and emphasizing that "only upon the City's recommendation and request" would UDC become involved in constructing housing anywhere within the City of Yonkers. GX 1096.74.

Several days later, Mayoral candidate Del Bello also pubicly disputed the Mayor's version of the June 12th meeting, saying that in fact the UDC had offered to conform to the City's wishes. GX 1096.78. Del Bello further criticized the Mayor's "divisive attitude," and suggested that to move the City forward, "we must stop threatening the people and start understanding and implementing their wishes." *Id.*

Del Bello offered as alternatives to scattered site housing the acquisition of surplus land along the arterials then being constructed; lease relocation housing in exisiting structures; acquisition of parcels made vacant by fire and demolitions of substandard

buildings; and the use of the "checkerboard strategy" to relocate individuals within an urban renewal area. GX 1096.100.

On July 10, a meeting was held among the City Council, representatives of the UDC, the Yonkers Economic Development Corporation ("YEDC") (a local business group), and the UDC's Citizens Advisory Committee ("CAC") to discuss sites for relocation housing. GX 1096.89. According to press accounts, twelve sites were proposed by the YEDC as possible sites for relocation housing, "touching off a passionate debate over racism." *Id.* Three of the five "primary" sites were reported to be located "deep in Yonkers' ghetto areas" and were criticized as such by the CAC Chairman, the Rev. William Gallagher; Vice Chairman Kenneth Skinner; and CAC member Msgr. John Harrington. *Id.* At the same meeting, a representative of the UDC reportedly reiterated that the agency "will not do anything the City does not want us to do" with respect to housing sites, and that it would not intervene in the City's internal disputes. *Id.*

In September, the Westchester County Board of Supervisors adopted a resolution, introduced by the Yonkers supervisors, calling for representatives of the county to introduce and lobby for state legislation to curb the UDC's power to override local zoning laws. GX 1096.103. The resolution recited that the UDC had proposed subsidized housing for sites in Yonkers where it would "completely destroy the residential character of the adjacent neighborhoods" and violate the City's zoning laws. *Id.*

Internal UDC memoranda circulated in September of 1969 indicate that Mayor O'Rourke asked the UDC to "ease off" on the issue of scattered site housing until after the November elections, and that the UDC CAC was eager to issue a statement in support of scattered site housing but had, to date, been dissuaded by UDC officials from doing so. GX 1096.101; 1096.105; 1096.106.

On September 29, the UDC sent Mayor O'Rourke a letter which notified him that the Otis Elevator Company had rejected the UDC's expansion proposal (thus largely ending the UDC's involvement with Otis), but which offered to go forward with the housing component of the proposed riverfront renewal area. GX 1096.107. The letter added that:

> The Citizens Advisory Committee is presently examining low and moderate income housing sites, and could be in a position to recommend a number of sites throughout the city shortly.
>
> I understand also that the City Council has been seriously reviewing scattered site housing locations throughout Yonkers. We are available to discuss the housing solutions with you and other city officials at any time.

Id.

No further action appears to have been taken on the Candeub & Fleissig sites in the months preceding the election. In November, Councilman Del Bello defeated incumbent Mayor O'Rourke in the mayoral race. Also defeated was incumbent third ward Councilman William Schneider, who ascribed his defeat, in part, to his support of scattered site housing. Tr. 1874-77; 1909.

Del Bello promptly abandoned the Candeub & Fleissig survey. As he explained at trial:

> I thought [the Candeub & Fleissig survey] was the wrong way to go, that it would build far more resistance on the part of the public to any housing whatsoever, and that if I had succumbed to the same position that Mayor O'Rourke had adopted, I could pretty well assure the people of Yonkers we would never produce any housing. I was dedicated to producing housing, and I had to find a political course that would allow us to get it constructed. And the course I chose was to not shotgun the issue, be very site specific, not to tilt at

> windmills, to use another expression, but to deal with sites that were realistic, that we could get approved and to get on to the process of building housing.

Tr. 1288-89.

By April of 1970, three months after Mayor Del Bello had taken office, Webdale and City Manager Seymour Scher had negotiated a draft agreement with the UDC to build 1,400 units of housing at four locations. GX 1088.8. All four were in Southwest Yonkers, within a several block radius of the Getty Square area. GX 1225.44. Three months later, a final version of the Memorandum of Understanding (calling for 1,200 units at three of the locations) was formally presented to the YURA Board and approved that same day. C-612. The following day, it was approved by the City Council as well. C-613.

One of the sites involved was the City's Stage II (Riverview) urban renewal area, which had originally been planned for commercial re-use, but which (over the strong objection of the City's Planning Director Philip Pistone) had been redesignated for combined commercial and residential re-use shortly after Walter Webdale's arrival in 1967. *See* HOUSING IV.D.1 *infra*. Plans had begun soon after for the joint construction of a school and subsidized housing complex on the Riverview site, *see* SCHOOLS IV.A.2.b *infra*, with the housing intended to serve the dual function of providing a source of relocation housing for those displaced by urban renewal projects, and encouraging a return of middle-income whites into the area. *See, e.g.*, GX 288; 1088.6. The July 1970 Memorandum of Understanding with the UDC doubled the number of housing units previously scheduled for the site. *Compare* GX 1088.6 *with* GX 1088.8 and C-6112.

The other three projects approved in the Memorandum — the Dorado, the Frazier Homes, and Whitney Young Manor — were intended to provide relocation housing for the (predominantly minority) population displaced by the Otis Expansion and

by urban renewal in one part of a Southwest neighborhood known as the Hollow. *See, e.g.*, Webdale Dep. 172, 231-32; Lenaz Dep. 73, 232-33, 251. Tr. 10,451-52 (Yost); C-606; GX 1097.14; 1144.4; 1120.16.

Neither the site selection for the three new projects, nor the doubling of the number of units scheduled for the Riverview site, appears to have been put to any public discussion during the rapid negotiation and extraordinarily rapid approval of the Memorandum of Understanding with the UDC. Nor were the matters submitted to the Planning Board for review. Tr. 9771, 9822 (Pistone).

3. The Glenwood/Ridge Avenue Project and Rockledge Heights

During the same months in which the July 1970 Memorandum of Understanding was under negotiation, Walter Webdale began meeting with a group known as the Clergy of Yonkers ("COY") and developer David Bogdanoff (both of whom were involved in the construction of other subsidized housing projects in the Southwest) regarding a proposal for the construction of a subsidized housing project for families near Glenwood and Ridge Avenues, at the northern border of Southwest Yonkers. The blocks immediately surrounding the proposed site, as well as those to the north and west, were overwhelmingly white, but there were a number of blocks with a 20-50% minority population to the Southeast. GX 1225.44; Tr. 10,191 (Bogdanoff). The project was intended to be a source of relocation housing for the Nepperhan Arterial extension, federal approval of which had been delayed due to a lack of an adequate relocation plan. GX 1207.3; 1099.8.

A developer, builder, architect, and attorney were hired, and (as he had with respect to previous projects) Bogdanoff absorbed the cost of the preliminary analysis. Tr. 10,190. At least $18,000 worth of work was completed, and COY and Bogdanoff met with

Webdale and Scher in the spring of 1970 to present their plans for the project. *Id.* at 10,191-92.

Bogdanoff testified that soon thereafter, Scher reported to him that there was "strong neighborhood feeling" against the project, led by the pastor of a large Catholic church in the area. *Id.* at 10,192. The church group announced that it planned to use the site for senior citizens housing, and Scher asked Bogdanoff to "help him out" in the matter. *Id.* Bogdanoff testified that he suggested to COY that it "withdraw graciously," and that he be allowed to absorb the loss "rather than to develop a principle fight which would get no place and would just tremendously increase the serious racial antagonisms that existed within the City." *Id.* Webdale likewise had reason to believe the church group's opposition to the family project was racially based. He testified that he had been told that members of the group had said that they "feared an influx of blacks into the neighborhood" would result if the project were built. Webdale Dep. 184-85; 579-581.

COY acceded to Bogdanoff's request to withdraw, GX 1099.11; 1099.12, and with the assistance of MHA Secretary-Director Emmett Burke, the church group received Planning Board and City Council approval for its proposed senior citizens project within a matter of months. GX 1099.9; 1099.11. The project was named in honor of the pastor of the church, Father Finian Sullivan, and opened in 1973. Charles Cola, who in 1971 was elected councilman of the sixth ward (in which the project was located) testified that he supported the project, and that if he had not, he "wouldn't have been elected." Cola Dep. 81. The occupancy data in evidence for the project describes it as 100% white. C-1650.

Fear about an influx of minorities was also expressed by area residents (and reported in the press) with respect to a proposed subsidized housing project known as Rockledge Heights. The site in question was in a predominantly white area of far Southwest

Yonkers, on the bed of the old Putnam Railroad line near Wolfe Street.

In the spring of 1970, the site was proposed for an 85-unit § 236 project to be used for relocation housing. GX 1105.1; 1105.2; 1105.5. Webdale kept the ward councilman, Dominick Iannacone, informed of the progress of the plans, GX 1105.2; GX 1105.3; noted the likelihood of "objections by the community concerning the usual public facilities, schools, etc." GX 1105.3, and asked that if the councilman had any comments, to please let him know "during these early phases." *Id.*

Councilman Iannacone initially supported the project, Tr. 990 (Iannacone), but then, as he explained at trial, he "got some flak on it." *Id.* at 991. Some area residents complained to him about the loss of the railroad bed as a parking facility. *Id.* Others who knew him better approached him privately and said they didn't want the housing because they didn't want any blacks there. *Id.* at 991-92. Iannacone testified that he was, at the time, a new councilman, and wouldn't have been elected the next time "with all those people against me," *id.* at 992-93, and that he accordingly told the City Manager he was opposed to the project, citing his constituent's concern about the loss of their parking facility. *Id.* at 992. Iannacone then attempted, unsuccessfully, to change the zoning for the site from multi-family to S-100, a highly rectrictive single-family zoning classification. GX 1105.10.

In late summer of 1971, the City Council voted seven to six to approve the project but then immediately voted unanimously to reconsider the vote and referred the matter to the Real Estate Committee, which was chaired by Iannacone. GX 1105.14. A press account, the accuracy of which was confirmed by Iannacone at trial, reported that the site had been "buried" in Iannacone's committee, and that he had "vowed not to let the project out of his committee until he had the council votes to kill it." GX 1105.16; *see also* Tr. 933 (Iannacone). The article also reported that the project had "created opposition among area residents,

mostly white, who are fearful that black and Puerto Rican families would move in." GX 1105.15. Iannacone's position was reported to be that he was now in favor of senior citizen housing for the site but against housing for families because parking, traffic, and local services would be strained." *Id.* No further vote was taken on the site by the City Council, *id.*, and Iannacone again tried (but again without success) to have the zoning of the site reclassified from multi-family to single-family. GX 1105.21; 1105.23.

Iannacone acknowledged that his publicly stated reasons for opposing the project were pretextual, and that his opposition in fact was in response to his constituents' racially influenced opposition. Tr. 991-993, 1526-29. The words "low-income," Iannacone explained, connoted "poverty, minorities, blacks, Puerto Ricans or Hispanics." *Id.* at 994. Senior citizen housing created less opposition, according to Iannacone, so long as the words "low income" were avoided. *Id.*

4. Seven Pines

During that same summer, HUD notified the City that its continued receipt of urban renewal funds would be conditioned on the approval of a site for subsidized housing that was outside the City's areas of minority concentration. *See* HOUSING IV.C.5 *infra*. As a result, scattered site housing once more became (as it had been during the time of the Candeub & Fleissig survey) a highly public issue.

The site of the Seven Pines project, located in the third ward on the northern border of Southwest Yonkers, was not considered by City officials to be a "scattered site," but in January of 1972, James Walsh, the newly elected councilman for the third ward, sought to rescind the City's agreement with the UDC to build the project, arguing that it could lead to scattered site housing.

The Seven Pines site was among those listed in the original April 1970 draft agreement with the UDC but was dropped from

the first round of UDC projects apparently out of concern on the part of City officials that too much tax abatement not be granted at once. The site was considered again by the UDC in April of 1971 along with two east side sites (the Robin Hill Day Camp site and a site at Mile Square and Tuckahoe Roads), GX 1098.15, and in June of 1971 the City Council authorized a memorandum of understanding with the UDC for the construction of 300 units of subsidized housing on the Seven Pines site. C-753.

The Seven Pines site was considered by City officials to be in a deteriorating neighborhood. A "mass exodus" of whites was believed to have occurred over the preceding decade, GX 1119.85, and City officials expressed the hope (as they had with respect to Riverview as well) that the Seven Pines project would "stabilize" the area and bring middle-income whites back to Southwest Yonkers. *Id.*; GX 1119.44; Tr. 901, 903-04 (Yulish); Webdale Dep. 434. The City Council's approval of the proposed project was unanimous. C-753.

A number of months later, however, in January of 1972, the project came before the City Council again to obtain a waiver of several aspects of the City's Building Code and local zoning requirements with respect to height. Public hearings were held, and the newly elected ward councilman, James Walsh, vigorously opposed the project, seeking first (unsuccessfully) to rescind the UDC agreement and then seeking to defeat the zoning and building waivers that were required for the project to go forward. *See, e.g.*, GX 1119.8; 1119.19; 1119.62.

Walsh's campaign against the project lasted some three months during which time he assailed the height of the building, its likely effect on area schools and traffic, the "windfall" the developer had received in selling the property to the UDC, and the loss of tax revenue created by an "unnecessary" tax abatement for a middle income building. *Id.* The arguments were characterized by Webdale as "the typical litany of issues." Webdale Dep. 432-33.

Walsh also argued, however, that Seven Pines represented a threat that a site on the east side of the City would be developed next, GX 1119.8, 1119.20, and, in the words of a UDC memorandum summarizing the situation, that the "defeat of this project by a unified front would guarantee that no scattered site developments would occur." GX 1119.20.

In response, City and UDC officials discussed the usefulness of meeting with Walsh to assure him that no additional sites would be chosen without consulting the ward councilman, GX 1119.21. In addition they publicly made statements to that effect, GX 1119.8, and privately considered whether the UDC should, if necessary, invoke its override powers. GX 1119.10.

When Walsh's efforts to stop the project failed, he introduced a resolution addressed to "the majority of councilmembers" who supported Seven Pines and who, "in opposition to the objections of community organizations throughout the City," have "expressed the concept of supporting subsidized housing . . . throughout the City." GX 1119.62. The resolution called on those councilmembers to

> submit to the agenda of the City Council, at the next regularly stated Council meeting, a firm Resolution giving one site, located within the confines of the Ward they represent, on which they confirm their support for subsidized housing, through either URA or UDC auspices, allowing them to build with complete impunity of zoning laws, confirming their willingness to give tax abatement on such structures and re-confirming their support of the Seven Pines concept as being the proper housing concept for the future of the City of Yonkers.

Id. The Council voted 8 to 5 to refer the resolution to the Real Estate Committee, from which it appears never to have emerged.[31]

5. Parkledge

Three months after the end of Walsh's campaign against Seven Pines, and in response to a year of steady pressure from HUD to approve a site for subsidized housing that was outside the City's areas of minority concentration, the City Council approved a site on Yonkers Avenue immediately west of the Saw Mill River Parkway.

Since at least mid-1970, HUD had been actively encouraging the City to adopt a "balanced housing program."[32] In July of 1971, it determined that stronger action was required. During that month, Grace Malone, the Director of the Fair Housing and Equal Opportunity Division of HUD's New York Area Office, wrote a memorandum concluding that the City of Yonkers' relocation housing programs were in violation of the civil rights laws and recommended disapproval of the City's Year II NDP application (the major source of federal urban renewal funds for the City). P-I 180-249. The basis of Malone's conclusion and recommendation was the City's failure to provide relocation

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[31]The City has sought to dismiss Walsh's campaign against Seven Pines as merely partisan politics — the efforts of a newly elected Republican to embarrass the Democratic administration. However, to suggest that party affiliation played a role in the controversy in no way diminishes the significance of Walsh's choice of political capital.

[32]That encouragement began with the rejection of a site proposed by the MHA for public housing in a heavily minority area of downtown Southwest Yonkers. The ground for rejection was publicly reported to be that the project would add to the area's racial imbalance; it was also reported that HUD had told the City to look for sites in Northern and Eastern Yonkers. GX 1094.36; *see generally* GX 1094. One month later, the City Council approved the first-round Memorandum of Understanding with the UDC for the construction of 1,200 units of subsidized housing in and around the downtown area. *See* HOUSING IV.C.2 *supra*.

housing opportunities for minorities outside of areas of minority concentration. *Id.*

As a result of Malone's memo, Malone and other HUD representatives held a series of meetings with City officials in July through November of 1971. The City was advised to submit substantiation of its "alleged efforts to achieve balanced site selection in Yonkers"; a submission was made; and HUD officials concluded at an internal meeting that the "program management staff should immediately impress upon the applicant the urgency for presenting sites for development outside Southwest Yonkers." P-I 180-256.

On September 3, 1971, Walter Webdale and City Manager Seymour Scher met with HUD officials and identified eight sites outside of areas of minority concentration that "could be pursued." *Id.* Four were in East Yonkers (including the Robin Hill Day Camp and Mile Square/Tuckahoe Road sites which had appeared in the April 1971 draft agreement prepared by the UDC); two sites were in Northwest Yonkers; one was just north of the Seven Pines site; and the remaining site was in far Southwest Yonkers. *Id.*

In November, Malone revised her recommendation regarding the City's NDP application to conditional approval, with the condition being that the next housing site selected by the City be one of the eight sites identified by Scher and Webdale. *Id.* This specific condition apparently was never communicated to City officials, but it *was* made clear that HUD would require a site outside the City's areas of minority concentration, and that the HUD officials involved preferred a site East of the Saw Mill River Parkway. Tr.840-41, 863-65; 1128-33 (Yulish); *see also, e.g.*, Cola Dep. 147-51; Tr. 1004-06 (Iannacone).

The task of finding an acceptable site fell principally to Morton Yulish, who had come to Yonkers in October of 1971 as the first Administrator of the City's newly created Department of

Development.[33] Yulish testified that he had frequent discussions with Mayor Del Bello and City Manager Scher about scattered site housing, and that they told him, in essence, that they had been unsuccessful in achieving it, and that it was his turn now. Tr. 845-46. In addition, Yulish testified that Del Bello and Scher explained that City Council approval would be required for any site, and that it would be hardest to obtain for sites East of the Saw Mill River Parkway "given the lack of support for such housing from those constituencies and the Council's historic lack of . . . guts . . . in dealing with these kinds of unpopular matters." *Id.* at 849-50.

Former Mayor Del Bello testified more diplomatically, but to the same effect. He explained that East side councilmen were subject to a "terrible amount of pressure" from their constituents to oppose subsidized housing proposals, and that "in almost every case the councilman was forced to respond to that pressure." Tr. 1197-98. Del Bello also confirmed that the opposition of the East side councilman had been effective. All of the City's subsidized housing projects were located in the Southwest, he testified, because "councilmen wouldn't approve sites in any other areas. These were the only sites we could get approved." *Id.* at 1193.

In describing his efforts to find a scattered site, Yulish testified that "quite honestly we were looking for the most politically doable route. The first way to do that was to find a site outside of racial impaction, but not wholly on the east side, which would have been the preferred route, but we did not limit

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[33]The Administrator of the Department of Development has responsibility for coordinating and administering community planning and development functions, and for overseeing the operations of the three offices within the Department — the Planning Bureau (formerly the Planning Department), the CDA, and the Bureau of Housing and Buildings.

Prior to joining the City's Department of Development, Yulish was Deputy Director of Operations in HUD's New York Area Office. In function, he replaced Walter Webdale, who, in turn, moved to the UDC in 1971.

ourselves to that. We went out and looked at sites all over Yonkers." *Id.* at 865.

Yulish testified that on some of the trips he was alone, "just doing reconnaissance," that on some he was with the field staff to analyze suitability, and that others "were political excursions" in which Yulish, Scher, and on occasion Planning Director Pistone, would go and "test the political waters with the particular councilmen." *Id.* at 866-67. Pistone's testimony with respect to his dealings with Yulish (and indeed his testimony with respect to all "political" matters) was characterized by a professed inability to recollect, and an obvious unwillingness to discuss, the subject. Pistone testified that he "vaguely" recalled being asked by Yulish whether the political obstacles with respect to certain East side sites were surmountable, and that he "might have said" that they weren't surmountable. Tr. 9897-98 (Pistone).

Yulish testified that from the fall of 1971 to the spring of 1972 he spoke, at least in general terms, with all of the East side councilmen, and attended a dozen or more meetings with neighborhood associations that he described as unforgettable because of the hostility he encountered. *Id.* at 865-67; 1060-64. In addition, he testified that his efforts to secure support for an East side site were particularly hampered by the activities of what he termed the "hit squads" or "truth squads," whose active members included third ward Councilman James Walsh and Angelo Martinelli, the Republican candidate in the 1971 mayoral campaign. Tr. 899-901. According to Yulish, these groups would visit the neighborhood associations, sometimes at the same time that Yulish and other City officials did, other times separately, and vocally oppose the administration's housing program, arguing, for example, that allowing the UDC to build in Yonkers was a violation of home rule, or that the City should be trying to attract industry, not building housing. *Id.* Also involved in what Yulish characterized as the "constant attack" and attempts to keep the issue of subsidized housing "at a boiling point" was the *Yonkers*

Home News and Times, a weekly paper published by Mayoral candidate Martinelli's brother. *Id.*

Soon after the November election, *The Herald Statesman*, the City's daily newspaper, published the results of a poll among new councilmembers on the issue of scattered site housing. GX 1098.70. Five were opposed; two were in favor (Councilmen Eisen and Chema from Southwest Yonkers); and six declared themselves undecided (among them newly re-elected Mayor Del Bello). Councilman Mancusi was quoted as saying he would support scattered site housing only if there were one new project in each ward. Councilman Iannacone stated that he would vote against any new housing proposal unless it had the support of the community. Councilman O'Rourke declared himself "irrevocably against scattered housing," stating that "[a]s a social proposition it is found lacking. Most of these developments will be filled with people from outside Yonkers." *Id.*; *see also* Tr. 1728-29 (O'Rourke).

In December of 1971, Yulish reported to HUD that he would continue his efforts to obtain approval for a subsidized housing site outside of areas of minority concentration but candidly warned that it would have to be "in an area with surmountable political obstacles outside of the areas of concentration." GX 1098.81.

Yulish testified that particular efforts were made to persuade twelfth ward Councilman James McLaughlin to support a site on Texas Avenue. McLaughlin, Yulish explained, was someone willing to talk to them, who wouldn't "immediately go to the press . . . saying they are conniving in my ward to build housing and I stopped it . . .," Tr. 869, and that he was also "probably the gutsiest one of all who might be willing to take the heat." *Id.* at 871.

Yulish testified that he, City Manager Scher, and McLaughlin visited the site at dusk to avoid attracting attention, and that

he and Scher basically "pleaded" with McLaughlin to consider how critical the Otis expansion project was to the City, and to see that "there were larger issues here than just the political heat of a group of neighborhood people screaming and yelling for their narrow self-interest." *Id.* at 869-70. City Manager Scher, according to Yulish, "bent over backwards" to offer McLaughlin and other ward councilmen benefits such as street work or a small park that they could use to persuade their constituents to accept a subsidized housing project. Tr. 870-71.

According to Yulish, McLaughlin asked for time to "test the waters," saying he wanted to do it but knew it was "going to be hell." Tr. at 871. McLaughlin acknowledged at trial that his eventual answer to Yulish was that it would be "political suicide" to support the site. McLaughlin Dep. 98-99; *see also* Tr. 871. (Yulish).

Yulish also testified to meetings with eleventh ward Councilman John Hanney, second ward Councilman Peter Mancusi, and fifth ward Councilman Andrew O'Rourke. In each case, according to Yulish, the councilmen set up meetings with neighborhood associations, which invariably proved to be hostile, and following which the councilman deferred to the wishes of his constituents. Tr. 865-66, 871-78, 880-81.

Councilman Hanney, according to Yulish, just "sat back and watched us get crucified." *Id.* at 872.[34] Similarly, Yulish testified, Councilman Mancusi arranged an unforgettably "chaotic" meeting with the Lincoln Park Taxpayers Association regarding possible use of the old Lincoln High School site, and then asked Yulish after the meeting "What do you want me to do? I don't control them. They elect me." Tr. at 881; *see also* Tr. 865.

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[34]Former Councilman Hanney testified that he could not recall meeting with Yulish to discuss subsidized housing sites. Tr. 10,073-74, 10,115-16.

Yulish's encounter with Councilman O'Rourke concerned the Robin Hill Day Camp site in far Northeast Yonkers, which had been mentioned several times in recent years as a possible site for subsidized housing.[35] Yulish testified that like the other east side councilmembers, O'Rourke suggested that they "take it to the neighborhood," and that he would go by what his constituency told him. Tr. 877. Yulish testified that the meetings were "hostile" and "highly emotionally charged," and that afterwards O'Rourke simply told he that he "didn't think it would work." Tr. 877.

Former councilman O'Rourke disclaimed any recollection of the meetings with Yulish, and testified that he believed he would have remembered such meetings if they had occurred. Tr. 1688-90. He did, however, acknowledge that not long after the time during which the Robin Hill site repeatedly arose as a possible site for subsidized housing, he changed his position on the use of the site for conventional multifamily apartments, and subsequently supported (for the first and only time in his eight years on the Council) the zone change needed to permit such a use. Tr. 1680- 84; 1690-93; 1726-27. O'Rourke also acknowledged that the developer's proposal contained a restrictive covenant limiting the use of the property to luxury low-rise condominiums. Tr. 1690-93.

In the spring of 1972, Yulish invited the Regional Director of HUD's New York Area Office, S. William Green, to visit

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[35]The Robin Hill Day Camp site was considered at least three other times between 1970 and 1972 as a site for subsidized housing — twice by the UDC (in June of 1970 and April of 1971) and once by the MHA in December of 1970 (in response to a HUD directive to consider scattered sites). The MHA proposed the site to the City Council and then withdrew it without explanation a few days later. The UDC prepared a draft memorandum of understanding for the Robin Hill site, but the proposal failed to go forward for reasons that are unclear from the record. Former UDC official Gerald Lenaz had a vague recollection of the site as "developable" but presenting acquistion problems. Lenaz Dep. 29, 34, 153-155; GX 1090.55; 1090.56; 1090.58; 1097.22; 1097.25; 1098.15.

Yonkers. Yulish testified that he hoped Green would "jar the Council" into taking seriously its obligation to build housing outside of areas of racial concentration. Tr. 1139-41.

Green came to Yonkers in early April and told City officials that if the City did not build subsidized housing outside of its inner city areas, it would in effect be disqualifying itself from millions of dollars in federal redevelopment funds. Tr. 1140-50 (Yulish); GX 1207-10; 1119.132. The clear substance of Green's message, according to Yulish, was that "enough is enough in this particular area." Tr. 1147-50. Yulish asked HUD to confirm in writing that the Otis expansion NDP grant was conditioned upon approving a scattered housing site, GX 1119.130, and HUD replied that *all* of the City's urban renewal funds would be cut off unless a scattered site was approved. GX 1119.32.

Shortly after Green's visit to Yonkers in early April, City officials and the UDC took action on plans for a 324-unit subsidized housing project that had been proposed by a developer several months earlier. C-778; C-780; C-781; C-783; C-784. The site of the proposed project was the so-called RAMP site on Yonkers Avenue next to the Saw Mill River Parkway. The site was on the border of the predominantly white neighborhood known as Nodine Hill, and had been proposed for public housing a number of times in the preceding decade but strongly opposed by area residents and Ward Councilman Moczydlowski. *See* HOUSING III.B and III.D.

Unlike previous years, however, City officials were able to win Moczydlowski's support. A major reason for their success in doing so appears to have been the fact that many of Moczydlowski's constituents were employed by Otis Elevator Company and faced the loss of their jobs if the City forfeited its federal urban renewal funds for the Otis expansion. Tr. 885-86; 1013-14 (Yulish).

Nonetheless, Moczydlowski expected, and in fact received, pressure to oppose the project from his constituents. Tr. 1018 (Yulish). Councilman Cola described the public hearings on the project as so "volatile" that you were lucky "if you remembered your name after you left there." Cola Dep. 149. Yulish testified that the crowd "filled out into the hallways" at the hearings, with action on the site deferred at least once in part because of the Council's reluctance to act "in the midst of this fury." Tr. 1022.

City officials met with Moczydlowski numerous times during the course of neighborhood and City Council meetings to "bolster his support for the project." *Id.* at 1019. Design changes were made to respond to community concerns that the access route to the project not run through a single-family area, *id.* and the councilman was not discouraged from telling his predominantly white constituents that they would be given preference in the rental of the project. Tr. 1015, 2142-45, 2148-49.

The project was unanimously approved by the City Council in June of 1972. GX 1119.100. A short time later, Councilman Moczydlowski resigned his seat on the Council and accepted an appointment as City Clerk. Councilman Cola testified that it was commonly accepted that Moczydlowski's prospects for re-election were "not too great," and that his appointment as City Clerk was no coincidence. Cola Dep. 97-98.

The Parkledge project was offered to HUD as the City's "precedent toward creating greater mobility to minority families and individuals." P-I 180-281. In fact, however, Parkledge proved to be the City's last new construction subsidized housing project for families. Although the UDC continued for a time to have access to a sizable supply of § 236 funds (despite a nationwide moratorium imposed on the program in January of 1972), and encouraged the City to "take advantage" of those available funds, no new family projects were pursued. GX 1120.59. In January of 1974, Angelo Martinelli took office as Mayor, having strongly advocated during his campaign that the City impose its own

moratorium on subsidized housing, Tr. 7432-33 (Martinelli), and no additional projects were approved for a number of years. When subsidized housing development for families resumed, it was initially limited to the rehabilitation of existing structures in Southwest Yonkers. Subsequently, the City agreed, at least in theory, to support the construction of subsidized housing for families in East Yonkers, but as late as 1982, the City Council had yet to support a specific site. *See* HOUSING V *infra*.

D. The City's Explanations for its Confinement of Subsidized Housing to the Southwest

The City contends that its confinement of nearly 3,000 units of new subsidized housing to Southwest Yonkers during this period occurred for reasons unrelated to any racially influenced community opposition to the placement of the housing elsewhere; and it has offered a number of arguments in support of that contention.[36] Viewed in the context of the record as a whole, the

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[36]The City also challenges the characterization of the opposition to subsidized housing in East and Northwest Yonkers as racially influenced, contending that the opposition in fact reflected nothing more than legitimate race-neutral concerns about density, traffic, overcrowding, and zoning. As indicated earlier, however, testimony of the City's own former officials and one who worked closely with them clearly suggests otherwise. *See* HOUSING IV.B. *supra*.

In addition, we note that former Mayor Del Bello specifically adddressed whether the opposition to subsidized housing that existed in certain parts of Yonkers could be characterized as simply opposition to high density, and he testified that it could not. Tr. 1421-22. Del Bello acknowledged that arguments against high density construction arose in "just about every zoning case ... dealing with residential development" whether subsidized or nonsubsidized. *Id.* at 1422. He went on to observe, however, that there were often modifications that could be made with respect to nonsubsidized housing to make it acceptable to area residents, while with respect to subsidized housing "it was far more difficult" — a difference he ascribed to the "other factors that pertain, such as low income and minorities." *Id.*

Del Bello's assessment is well supported by the record, which shows that during the 1960's, and through the mid-1970's, there was steady construction of multifamily housing in East Yonkers, GX 1310 (more than 2,800 units in buildings of 50 units or more); that construction often occurred after zoning

(Footnote 36 continued on next page)

arguments are not persuasive. Some are not supported by the record. Others are of marginal relevance. Still others suggest only that many of the City officials involved with subsidized housing during this period were otherwise well-intentioned individuals who accepted the constraints imposed by the racially influenced opposition to subsidized housing in East and Northwest Yonkers, but within those constraints, attempted to do as much good as possible. Whether taken singly or collectively, the City's arguments fail to alter the conclusion compelled by the record as a whole that the confinement of subsidized housing to Southwest Yonkers was, as Mayor Del Bello himself suggested, due to the fact that Southwest sites were the only ones that the City Council would approve. Tr. 1192-93.

1. Reliance on HUD's Express Directions

The City first suggests that the decision to confine subsidized housing to the Southwest was largely HUD's. In support of that suggestion, the City points to the testimony of Walter Webdale, the City's Director of Urban Renewal from 1967 to 1971, who stated that the City's exclusive focus on the Southwest for subsidized housing was due, at least in part, to express instructions from HUD officials to build relocation housing in or near the City's urban renewal areas. Webdale Dep. 154, 156, 165-66.

However, there is little evidence to support Webdale's suggestion that HUD instructed the City to concentrate exclusively on sites in the Southwest, and considerable evidence to the contrary. No other City official testified to having received, or heard of, such an instruction. No HUD official testified to having

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(Footnote 36 continued from previous page)

changes or vacancies had been granted, *see, e.g.*, P-I 185, Tr. 9824-26 (Pistone); and that some of the sites were ones for which subsidized housing had previously been proposed or discussed. *See, e.g.*, Tr. 9681, 9685, 9826 (Pistone); 2773-74 (Arcaro) GX 1225.48; 1225.49. Indeed, in at least one case during this period, consideration of the site for subsidized housing appears to have facilitated the zoning change needed to allow construction of conventional multifamily housing. *See* HOUSING IV.C.5 *supra* (the Robin Hill Day Camp site).

given such an instruction. Indeed, at least one HUD official expressly testified that the location of subsidized housing was for the locality to determine. Tr. 5612-13 (Lapadula). Nor has the City pointed to any written instruction from HUD either requiring or suggesting that only sites in and around urban renewal areas be considered.[37]

To be sure, there was a very real economic advantage to be gained from choosing urban renewal land as the site for a subsidized housing project: the land could be sold to the developer at a greatly reduced price with the federal government subsidizing much of the price reduction. Tr. 5860-63 (Lapadula). That economic advantage falls short of a formal restriction of subsidized housing to urban renewal areas. Nor could it even be argued to have operated as a *de facto* restriction since most of the City's subsidized housing projects were in fact not located within urban renewal areas.

Similarly, there is little dispute that HUD's policies over the years reflected changing views and emphases, and that at least in the mid-to-late 1960's, there was a general concern about avoiding the charge made in earlier years that urban renewal too often involved "black removal" — that is, the clearance of an area of its largely minority occupants, with no provision made for relocation housing. *See, e.g.*, Tr. 10,692-95 (Portman). In light of this general concern, it is reasonable to assume that HUD may have encouraged the City to put some of its relocation housing near the major urban renewal areas. *Cf.* Tr. 8698-704 (Kane). There is no basis for concluding, however, that HUD directed the City to locate *all* of its relocation housing in or near urban renewal areas

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[37]Instead, the City has introduced evidence tending to show that it was HUD's policy to give priority in funding to housing projects that were connected with another HUD-assisted program. C-1564; C-1565; C-1573. However, since there was no shortage of available funds during these years, this theoretical priority appears to have had no practical significance, Tr. 5805-06 (Lapaula). Nor has the City pointed to any evidence that the priority influenced its site selections.

— particularly in light of the concern expressed by HUD as early as 1966, and steadily from mid-1970 on, about the segregative effects of concentrating all subsidized housing in the City's downtown area. *See* HOUSING III.D and IV.C.5, *supra*.

In addition, the contemporaneous actions of Webdale and other City officials further suggest that HUD did not instruct the City to confine subsidized housing to urban renewal areas or their immediate vicinity. Webdale acknowledged that he himself looked at sites that were removed from urban renewal areas, *see* Webdale Dep. 58, 137, 479, and his office at least once publicly stated that after completion of Jefferson Terrace (the first privately sponsored subsidzed housing project), other projects would be built on scattered sites throughout the City. GX 1079.66. The City and the UDC also hired the firm of Candeub & Fleissig to survey the City and identify possible sites for relocation housing —a considerable waste of time and money if relocation housing were in fact limited to sites in and around urban renewal areas. Moreover, even assuming the unlikely proposition that Candeub & Fleissig somehow misconstrued its assignment, the furor that erupted when the survey was released could have been easily put to rest by announcing that HUD had directed relocation housing to be placed only in and around urban renewal areas. It seems highly unlikely that City officials would have forgone such an easy means of defusing community opposition if, in fact, it had been available to them. Yet, recalling the pattern of previous years, the only apparent mention of restricting relocation housing to urban renewal areas was made by a representative of a Northeast Yonkers neighborhood group. *See* GX 1096.65.

Finally, we note that Webdale himself appeared to retreat somewhat from his broad statements about HUD's policy on relocation housing by acknowledging later in his testimony that HUD's instructions may have related only to the Stage II urban renewal area. Webdale Dep. 499-500.

However, even if limited to the re-use of the Stage II urban renewal area, Webdale's testimony is still at variance with the record as a whole. Webdale testified that while the re-use of the Riverview urban renewal area may have been a "local determination" in theory, the decision to have at least some residential re-use in fact was made by HUD. Webdale Dep. 29-33, 588-90. According to Webdale, residential re-use was mandated by HUD so that relocation housing would be available for those displaced by the Stage II and other urban renewal projects. *Id.* at 33.

However, the statutory requirement, and HUD's general policy, was merely that relocation housing be provided *somewhere* within the locality. *See, e.g.*, Tr. 6936-37 (Schiffman). Only if it were deemed difficult or impossible to place relocation housing elsewhere would such a requirement become, in effect, a requirement that urban renewal areas be used for relocation housing. There is no question that HUD made the statutory requirement with respect to relocation housing clear to City officials. Any conclusions about the effect of that requirement in Yonkers, however, appears to have been made by City officials themselves rather than HUD.

Webdale's testimony that HUD determined the specific re-use of the Stage II urban renewal area was not supported by any other City or HUD official. Indeed, Planning Director Philip Pistone testified directly to the contrary. Tr. 9865, 10,008 (Pistone).

In addition, the record indicates that the issue of re-use was vigorously debated by City officials. GX 1057.1; C-254; C-259; C-262. The Master Plan called for commercial re-use of the area, and prior to the reduction of the project size by HUD in 1965, commercial re-use indeed had been contemplated. Planning Director Pistone maintained, as he would continue to do well into 1970 that notwithstanding the reduction in size, commercial re-use of the area was both feasible and essential to the future

economic health of the City. Tr. 9864-68, 9877-78 (Pistone); 2779-80 (Arcaro).

Pistone held to his position even after wholly commercial re-use was rejected as unfeasible by several consulting reports prepared for the City in 1966 and 1967 (another curious waste of time and money if in fact the re-use had been determined by HUD). C-255; C-261; C-1546. Pistone contended that the reports were merely statistical studies prepared by people who knew little about Yonkers. C-262. Nonetheless, YURA decided in 1967 to recommend a combined commercial and residential re-use, with commercial development to the north, and residential development in the southern portion of the urban renewal area. C-262; GX 1079.

To be sure, there is evidence that the need for relocation housing figured in the re-use determination. *See, e.g.*, Tr. 9866 (Pistone). However, there is little if any indication in the contemporaneous evidence of the re-use debate that any City official (including Webdale himself) believed that as a matter of HUD policy, the urban renewal area could not be put to solely commercial use if an adequate amount of relocation housing were built elsewhere. Instead, the conclusion that appears to have been reached is that other locations were unavailable for such housing. In a June 1967 letter to Congressman Ottinger, most notably, Webdale explained that it was "absolutely imperative that some residential use remain in the Project Area, since the Relocation Program for problem families (*i.e.*, apartment construction under FHA 221(d)(3)) depends on this type of housing." GX 1087.12.

The City's prior history of site rejections suggests why those in need of subsidized housing were considered "problem families" in 1967, and the reaction to the Candeub & Fleissig survey two years later made clear that those families would remain a problem. Thus, it is scarcely surprising that immediately following the public reaction to the Candeub & Fleissig survey, City officials

doubled the number of housing units previously designated for the Stage II site.[38]

In sum, there is little evidence to support the City's assertion that the decision to confine subsidized housing to the Southwest was largely HUD's. The evidence suggests, instead, a conclusion by City officials that the opposition to subsidized housing outside of Southwest Yonkers effectively transformed the requirement that adequate relocation housing be provided into a need to build as much subsidized housing as possible in the Southwest. The responsibility for that conclusion, however, clearly rests with the City and not HUD.

2. Absence of Private Developer Proposals in the East

The City also argues that the location of all subsidized housing projects in the Southwest during this period can, at least in part, be explained by the absence of proposals by private developers for projects in the East and Northwest — an absence the City attributes to higher land costs and lack of developer interest in East Yonkers for subsidized housing.

Like the last, this argument in essence seeks to shift the responsibility for site selection to another entity, and like the last, the effort is not persuasive.

The City acknowledges as it must, that the development of subsidized housing projects during this period was by no means the result of the City's passive acceptance of sites brought to it by private developers or the UDC. Beginning with Walter Webdale's

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[38]Webdale did not contend that HUD required or encouraged the City to reach an agreement with the UDC to build 800 units of housing on the Riverview site. Indeed, no testimony by him was offered on the decision to double the number of units planned for the site. The only witness who offered any explanation for the change was Planning Director Philip Pistone, who suggested that the increase was brought about by City Manager Scher and Walter Webdale, the latter of whom believed the site should be used for relocation housing Tr. 9878-79.

arrival in the spring of 1967, the City pursued a course of active support and encouragement of privately sponsored subsidized housing projects in the Southwest. *See* HOUSING IV.C.1 *supra*. No comparable outreach was made for the Northwest or East. Indeed, as the City itself points out, its focus on the Southwest was clearly communicated to developers. *See* City's Proposed Findings of Fact at p. 56-57; *see also* Tr. 10,182-83; 10,196-97 (Bogdanoff).

In light of the City's actions, the absence of proposals by private developers for projects in the East or Northwest is unsurprising. David Bogdanoff, the builder of Jefferson Terrace and Jackson Terrace, and a participant in the abandoned proposal for family housing on what is now the site of Father Finian Sullivan Manor, testified that in general developers could build only on sites where the local government would provide assisance in acquiring the land. *Id.* at 10,140-44. Otherwise, according to Bogdanoff, there was no hope of meeting the cost limitations imposed by HUD. *Id.* Thus, the absence of developer proposals seems less a function of high land costs being unique to East and Northwest Yonkers, than the availability of City assistance being unique to the Southwest.

Similarly unpersuasive is the City's suggestion that those interested in subsidized housing were not interested in locations outside of the Southwest. Bogdanoff made clear that his decision to concentrate on Southwest sites was pragmatic. Choosing the same metaphor used by Mayor Del Bello in his testimony, Bogdanoff explained that he had little interest in "tilting at windmills." Tr. 10,144, 10,229. In Northwest and East Yonkers, Bogdanoff indicated, City support was lacking, community support was lacking, racial fears were strong, and so he decided to "build where we . . . could build," produce the housing "now and let the world catch up with this problem," and in the meantime "at least try to set an example in an area where we know the need exists and we know that we have the potential of doing it" as

opposed to working on projects "that would never happen." Tr. 10,299; *see also* 10,143-45, 10,179-80, 10,224-25.

In light of Bogdanoff's own experience with the Father Finian Sullivan site, *see* HOUSING IV.C.3 *supra*, his conclusion that a project "would never happen" without community or City support seems particularly sound. And especially after the reaction to the Candeub & Fleissig survey, there could be little reasonable expectation of community or City support of a site in the East or Northwest. Thus, the absence of private developer proposals in the East or Northwest is neither surprising nor at variance with the conclusion suggested by the record as a whole. A builder's understandable reluctance to risk the loss of time and money on projects that are likely to be opposed by the community (and therefore by the City as well) says little about what the builder would have done if either community or City support had been a realistic possibility.

The City cannot participate in the creation of an atmosphere that would strongly discourage proposals for subsidized housing in East or Northwest Yonkers, and then defend the resulting concentration of subsidized housing in the Southwest on the ground that there were no proposals to put it elsewhere.

3. Support for the Projects Among the Minority Community

The City also argues that the support of the minority community for subsidized housing in Southwest Yonkers during this period precludes a finding that the City acted with segregative intent. In this regard, the City emphasizes that both the privately sponsored and UDC-sponsored projects were supported by, and in three cases even initiated by, the minority community in Southwest Yonkers.

The Messiah Baptist project was proposed and sponsored by the Messiah Baptist Church. C-539; C-5443. Waverly Arms was proposed and sponsored by the Community Memorial CME Church. C-554 through C-557. And Whitney Young Houses, one

of the first-round UDC projects, was proposed and co-sponsored by the Yonkers Community Improvement Corporation (YCIC), a predominantly minority community group, and the Westchester Urban League. C-643, C-644; Gunthrope Dep. 22; Lenaz Dep. 20-25, 66.

In addition, two of the other first-round UDC projects, the Dorado and the Frazier Homes, which were located near the Otis Elevator expansion area and designated as relocation housing for the predominantly minority residents of that area, appear to have been supported by the surrounding community, *see, e.g.*, Tr. 1346-47 (Del Bello), and there is also evidence of support among the minority community for Parkledge, the UDC project located on Yonkers Avenue, immediately west of the Saw Mill River Parkway. *See, e.g.*, Tr. 2269 (Yulish); 578-79 (Gibson); *but see* Tr. 8385-87 (Keith).

The City can scarcely maintain, however, that its officials believed that the minority community in Yonkers wanted *all* subsidized housing confined to the Southwest section of the City.[39] As early as 1959, minority groups had begun expressing concern about the segregative effects of locating subsidized housing in heavily minority areas, *see* HOUSING III.B *supra*, and from the mid-1960's on, there is evidence of regular and often public expression by minority and other community groups, and even by some City officials, of support for the concept of scattered-site housing, and concern about the segregative effects on concentrating the City's subsidized housing in one part of the City. In November of 1970, for example, a Southwest Yonkers community group wrote to protest the "oversaturation of low-income housing" in the area, contending that the continued concentration of such housing there would "inevitably lead[ ] to the creating and perpetuating of ghettoes." GX 1094.50. Simi-

[39]Nor, of course, is consent a justification for acting with segregative intent. We raise the issue solely to assess the City's suggestion that it was responding to legitimate community concerns about the destruction of existing neighborhoods.

larly, in April of 1972, a petition from the "residents and property owners of the Hollow" urged the City to adopt a policy of scattered-site housing, contending it was "morally right and [would], in the long run, benefit the entire city." GX 1144.11. *See also, e.g.,* GX 1074.5; 1079.7; 1081.7; 1081.8; 1093.8; 1098.86; 1119.67; 1119.81; 1119.86; 1119.136; 1144.8-.10; 1144.13; 1176.16; 1206.2; HOUSING III.D *supra.*

To be sure, there is also evidence of concern among some members of the minority community about preventing the phenomenon of "black removal." Indeed, that concern appears to have figured in the support among the Otis relocatees for the Dorado and Frazier Homes, and in the sponsorship of Whitney Young Manor in the Hollow, where there was considerable racial tension between the older, largely Slavic, millworkers who lived there and the steadily increasing number of black and hispanic residents. *See, e.g.,* Lenaz Dep. 42-43, 250-51; GX 1144.5.

But if the City seeks to characterize its selection of sites for subsidized housing as a response to the concerns of the minority community, then it was, at best, a one-sided response. Concerns about the ability to remain in Southwest Yonkers were accommodated. Concerns about having the opportunity to live elsewhere in Yonkers were not.

Moreover, as the City itself has stressed, the Southwest community, both white and minority, was faced with housing conditions that could fairly be characterized as desperate. *See, e.g.,* 1083.41. The residents of the Northwest and East could comfortably ignore the need for subsidized housing and urban renewal in Yonkers. The residents of the Southwest could not. And given the public reaction to the CAC list in 1967, the Bronx River Road sites that same year, and the Candeub & Fleisig survey in 1969, one could well conclude, as indeed several witnesses suggested they did, that the possibility of obtaining City Council approval for sites outside of Southwest Yonkers in the foreseeable future was remote. *See, e.g.,* Tr. 7252-53 (King); 536-

40, 564-66, 573-75 (Gibson). Thus, even if the minority community had not made its support of scattered-site housing clear, there would have been little basis under the circumstances that prevailed in Yonkers for construing minority proposals or support for individual projects as an expression of preference for having all subsidized housing located in Southwest Yonkers.

No City official testified that he believed that the minority community wanted to confine subsidized housing to the Southwest. To the contrary, many City officials — including Mayor Del Bello and Walter Webdale — acknowledged their awareness of that community's desire to disperse the housing throughout the City. TR. 1313-15 (Del Bello); Webdale Dep. 318, 488; *see also, e.g.*, Tr. 9772, 9992 (Pistone); 845-46 (Yulish). Even Gerald Lenaz, a program manager for the UDC, who met with community groups in connection with most of the first-round UDC projects, and who testified at greatest length about "black removal" concerns, acknowledged that minority groups also expressed considerable frustration at the City's refusal to approve sites outside of Southwest Yonkers. Lenaz Dep. 242-43.

Similarly, no City or UDC official suggested that the site for Parkledge was chosen over East side sites because of a belief that minorities preferred to remain in Southwest Yonkers. Nor could minority support of Parkledge reasonably be construed as such a preference. At HUD's insistence, the City had at last designated a site outside of an identifiable area of minority concentration, and it was a site that had been vigorously and successfully opposed in the past. *See* HOUSING III.B and III.D *supra*. Although the site, like all the others, was in Southwest Yonkers, and although, as CDA employee Herman Keith observed, the site was adjacent to the heavily minority area of the Hollow, Tr. 8385-87, it unquestionably represented at least some progress. Thus, the existence of minority support is not surprising. As William Gibson, a black resident of Yonkers and member of the UDC-CAC succinctly explained, "at least we could see" the Saw Mill River

Parkway from Parkledge, "and the next step might win us over." Tr. 578-79.

Far from negating the suggestion that City officials acted with segregative intent in their selection of sites for subsidized housing, the evidence concerning the position of the minority community makes clear that both the public and City officials were acutely aware of the potentially segregative or integrative effects of site selection.

4. The Unsuitability of East Side Sites

The City also contends that the various sites considered in East and Northwest Yonkers during this period were, for reasons unrelated to any racially influenced community opposition, generally not suitable for subsidized housing. According to the City, the sites listed in the Candeub & Fleissig survey, as well as the other East side sites that were considered for possible UDC projects during the HUD-mandated search for a "scattered site," presented significant problems relating to cost, zoning, topography, traffic patterns, proximity to public facilities, and various other physical planning considerations.

However, there is little persuasive evidence to suggest that any of the sites proposed outside of Southwest Yonkers were in fact rejected on the basis of planning criteria. With respect to the Candeub & Fleissig sites, for example, Planning Director Pistone testified that he "never had much of an opportunity to do anything with those sites." Tr. 9771. Nor, it would appear, did any other City official. The list was announced, successfully campaigned against by Mayoral candidate Del Bello, and promptly abandoned upon his election. *See* HOUSING IV.C.2 *supra*.

To be sure, the quality of the Candeub & Fleissig survey was roundly criticized by the City and UDC officials who testified. Walter Webdale, for example, discussed it as little more than "a catalogue of vacant land." Webdale Dep. 66; *see also* Logue Dep. 72, 74, 195 ("a buckshot thing"; did not present UDC with "an

abundance of easy choices"); Tr. 1284, 1295-97 (Del Bello) (included unrealistic, foolhardy, ludicrous sites). And it may well be the case that some of the sites were in fact "ludicrous" from more than a political perspective. However, even with respect to the eleven sites selected by Pistone and others for further study — at least some of which Pistone characterized at the time as feasible — Tr. 9767-68, 9873, 9942 (Pistone), City officials appear to have simply assumed that the sites were not feasible, rather than determining whether or not they were.[40]

Similarly, although the City contends that the RAMP site "emerged" as the most feasible "scattered site," it is not apparent from the record that this process of emergence was governed by planned criteria. The single east side site formally identified to HUD as an alternative that was considered but rejected was the old Lincoln High School site — a site Planning Director Pistone characterized as suitable, but which was the subject of one of the "unforgettable" neighborhood association meetings testified to by Morton Yulish. C-802; Tr. 9896-98 (Pistone); *see* HOUSING IV.C.5 *supra*. Other east side sites were apparently considered by the UDC but not pursued for reasons unspecified in the record. When asked about various sites, Walter Webdale (who by then had moved to the UDC) stated simply that the sites the UDC pursued were those that got a positive response from the City. Webdale Dep. 661-63. He went on to acknowledge that the only such site was the RAMP site. *Id.*[41] Thus, here too the evidence

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[40]The UDC appears to have been operating under a similar presumption, at least during site selection for the first-round of UDC projects. Gerald Lenaz, a project manager for the UDC at that time, testified that during the extremely small amount of time he had to look at sites before the first Memorandum of Understanding was signed in July of 1970, he basically came to the conclusion that all of East and Northwest were, as a general proposition, not feasible for subsidized housing for reasons of site configuration and topography. Lenaz Dep. 18, 37, 38, 136, 196.

[41]Webdale testified that he simply could not recall why the other sites were rejected. *Id.* The record as a whole is equally vague.

suggests a presumption rather than a determination that east side sites were unsuitable.

In the Southwest, by contrast, particularly with respect to the first-round UDC projects, there appears to have been a presumption in favor of suitability. As noted earlier, none of the new sites in the first-round projects (Whitney Young, The Dorado, and Frazier Homes) were submitted to the City Planning Board for review; nor was the decision to double the number of units for the Riverview site. Riverview I and II were approved without a firm indication of the income-mix of housing that would be put there (a curious gap for what was considered the centerpiece of the City's efforts to lure middle and upper income whites back to the Southwest). *See* HOUSING IV.D.5 *infra*. The Dorado and Frazier projects were approved without any financial feasibility study whatsoever; and when one was undertaken several months later, the donation of City-owned land (in addition to the tax abatements contemplated) was required in order to make the projects feasible. C-617. Similar City assistance was also required for Whitney Young (in the form of the donation of City owned land), C-616; for Parkledge (in the form of an after-the-fact declaration of part of the site to be an urban renewal area in order to enable a federally subsidized write-down of land costs), C-787; and for Jefferson Terrace, Messiah Baptist, and Waverly Arms (in the form of a discounted sale of land condemned or otherwise acquired by the City) GX 1079.61a; 1083.25; 1084.21.

In addition, it is noteworthy that many of the Southwest sites were far from perfect from a physical planning perspective. For example, Jackson Terrace, Messiah Baptist, Parkledge and the Buena Vista projects all required variances for the absence or inadequacy of parking facilities. GX 1081.16a; 1082.32; 1083.25; Tr. 2129 (Yulish). Jackson Terrace, Messiah Baptist, and Seven Pines exceeded height restrictions and required variances on that ground. GX 1083.25; 1120.35; Tr. 10,185 (Bogdanoff). Jefferson Terrace, Jackson Terrace, Messiah Baptist, and Parkledge had

topographical problems which added to construction costs. GX 1082.1; Tr. 10,185, 10,208, 10,213 (Bogdanoff); Tr. 1031 (Yulish); Webdale Dep. 227-28. The Dorado and Frazier Homes were in areas zoned for commercial or industrial use. GX 1120.35; P-I 122-23. Whitney Young was in an area designed in the Master Plan for industrial re-use. Tr. 9822 (Pistone). Riverview I and II were in an area designated in the Master Plan for commercial re-use. Tr. 9515 (Pistone). Parkledge was located on a heavily trafficked street, was relatively far from shopping, and was served by schools considered to be overcrowded. Tr. 1031 (Yulish); 9774 (Pistone); Webdale Dep. 261-63; GX 1098.85; *see also* GX 1060 (on the objections raised to the site by area residents in 1956). Parkledge also required a choice between routing the project's traffic through a single-family neighborhood or creating a dangerous left-turn onto Yonkers Avenue. (The latter was chosen over the objections of the City's traffic planners). Tr. 1023-26 (Yulish).

Similar and even identical problems have been offered to explain why particular sites outside of Southwest Yonkers were rejected or never seriously pursued. Yet, all of the Southwest sites described above were approved, most with little hesitation, while sites outside of Southwest Yonkers were rejected with little apparent study. Significantly, not a single City official testified that he believed there to be an absence of suitable sites for subsidized housing outside of Southwest Yonkers. Indeed, both Planning Director Philip Pistone and former Deputy Planning Director Gregory Arcaro testified that suitable sites were in fact available. Tr. 9749 (Pistone); 2798-800 (Arcaro). Particularly in light of the strong evidence of community opposition to sites proposed outside Southwest Yonkers, there is no basis in the record for concluding that the apparent presumption against East and Northwest sites was motivated solely (or even largely) by planning criteria.

The City has also suggested that because § 236 projects were subject to land acquisition and construction costs calculated on a per unit basis, sites in the Northwest and East were generally not feasible unless legitimate standards of acceptable density were compromised. However, the cost limitations imposed upon § 236 projects were by no means cast in stone. *See, e.g.*, Tr. 6942-46, 7078-87 (Monticciolo). The land acquisition costs for the Messiah Baptist project in Southwest Yonkers, for example, far exceeded the applicable ceiling. C-1706. Similarly, the UDC routinely exceeded § 236 cost limits, and even specifically advised the City that it had the ability to underwrite excess land acquisition costs. Tr. 853-54 (Yulish).

In addition, there is no persuasive evidence to suggest that the same techniques used to reduce land costs in Southwest Yonkers — that is, donation or below-market sale of land owned or acquired by the City, or the designation of pockets of blight as urban renewal areas — could not have been used in East and Northwest Yonkers. In fact, a survey of City-owned land was even urged by the UDC in 1971 and acknowledged to "make sense" by City Manager Seymour Scher. GX 1098.1. The technique of aggregating projects that was used to make the 28- unit Frazier Homes project feasible could also have been considered for sites owned outside of Southwest Yonkers as could the technique of combining subsidized housing with other structures such as commercial facilities or even a school (as was done with respect to Riverview I and II).[42] Moreover, it bears emphasis that Northwest and East Yonkers were by no means exclusively single-family areas. Multiple family dwellings were prevalent and

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[42]Former UDC official Gerald Lenaz acknowledged that the technique of combining a small East side project with a larger Southwest project would work financially, but suggested that joint management of the two projects would be difficult since the proper "community tenant association rapport" could not be achieved. Lenaz Dep. 215-16. The argument is decidedly less than compelling.

steadily increasing, *see* fn. 36 *supra*, thus making generalizations about acceptable density likely to be over-simplifications.[43]

To be sure, serious questions of policy are implicated whenever a tax abatement is granted or City land is donated or sold at a discount, and it is not inconceivable that a locality might conclude, even in the absence of community opposition, that such actions are inappropriate in particular areas of the City. However, these issues of policy appear to have been raised not by City officials, but by area residents in petitions and at emotion-filled meetings. There is no evidence of any reasoned debate of the issues among City officials.

The apparent absence of any serious consideration of East side sites is particularly noteworthy in view of the significant disadvantages of the course being followed by the City. Land that was zoned or designated for commercial or industrial use was given over instead to housing at a time when it was generally agreed that serious efforts should be made to increase the City's industrial and commercial tax base. *See, e.g.*, Tr. 2870 (Arcaro). Subsidized housing was increasingly concentrated in and around the downtown area despite warnings that it could further hinder the prospects for commercial revitalization. *See, e.g.*, Tr. 2779-

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[43]The City has cited a December, 1971 letter from Morton Yulish to HUD as evidence that high land costs in East Yonkers posed a significant obstacle to the construction of high land costs. C-633. However, the letter merely stresses the need for HUD's willingness to provide rapid financial assistance should a site become available since

> it would be embarrassing to all concerned if we had an opportunity to reverse a trend and let it fall by the wayside because the bureaucracy stood in our way or funds were not made available.

Id. Such a statement scarcely suggests that high land costs had been the chief obstacle to the development of subsidized housing in East Yonkers. And an earlier part of the letter, which has been quoted above, *see* HOUSING IV.C.5 *supra*, makes clear that it was not. The letter is the same one in which Yulish advised HUD that the site would have to be in "an area with surmountable political obstacles." *Id.*

82, 2865-70 (Arcaro); 9773 (Pistone); GX 1172.1; 1080.8; 1090.5; 1093.8. Yet, there is little evidence that the pros and cons of dispersing at least some of the City's subsidized housing were ever seriously considered by City officials. Not even when the failure to designate a site in East Yonkers risked the loss of the City's badly needed urban renewal funds is there any apparent evidence that East side sites were considered beyond a preliminary testing of the "political waters."

The apparent absence of any serious consideration of specific East side sites merely reinforces the suggestion of the record as a whole that the option of putting subsidized housing in East Yonkers was not considered politically feasible.

In addition, the history of the City's § 23 Leased Housing Program provides further indication that the total confinement of subsidized housing projects to the Southwest was not the result of the universal unsuitability of East side sites. Under the § 23 program, the City rented apartments in privately owned buildings and then, using federal rent subsidies, sublet them to low-income tenants.

As City officials acknowledged in descriptions of the program, § 23 housing was specifically intended to promote dispersal of low-income housing throughout a community. P-I 160-36, P-I 160-43. Indeed, Walter Webdale expressly represented to HUD in 1971 that the § 23 program was being used to provide relocation housing "throughout the City." P-I 160-31.

Yet, the record indicates that from the inception of the program in 1969 through its phasing out in the mid-1970's, all, or virtually all, of the leased units were located in Southwest Yonkers buildings. P-I 160-26; P-I 180-249; GX 1176.24; 1176.28; Tr. 2895-97 (Arcaro). The record also indicates that the § 23 tenants were overwhelmingly minority, C-405; P-I 161; GX 1114.6; that when the possibility of renting units in buildings in heavily white areas was first raised at a CAC meeting in 1967, "it

was questioned whether realtors and 'city fathers' would approve," GX 1079.6; and that the City in fact agreed to consult with each councilmember before using § 23 housing in his or her ward. GX 1176.17.

Thus, even with respect to a subsidized housing program which the City claimed to be using for the dispersal of low-income housing, and which created few, if any, of the problems traditionally cited as grounds for opposing subsidized housing in the East (zoning, increased density, traffic congestion, etc.), *see* P-I 160-43, the housing was once again essentially confined to Southwest Yonkers. The result is difficult to explain except by reference to the race of the tenants.[44]

5. Pursuit of a Legitimate Planning Strategy to Use Subsidized Housing to Rebuild the Southwest

The argument most vigorously pressed by the City is that the confinement of subsidized housing sites to Southwest Yonkers during this period reflected a legitimate planning strategy to use subsidized housing to revitalize that section of the City. Subsidized housing was used, according to the City, as a "seed investment" to encourage private-market residential and commercial development in the Southwest, and to encourage a return of middle and upper income whites to the area.

The overall failure of that strategy cannot seriously be disputed. Seven of the eight privately sponsored subsidized housing projects rented up, and remained, heavily minority, with five of the seven having an initial minority tenancy in excess of 80%.

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[44]The City contends that it made a race-neutral and legitimate decision to use the Section 23 program to enable rehabilitation of buildings in Southeast Yonkers. At minimum, however, such a use represents another example of the City's consistent choice of the segregative alternative in favor of the integrative with respect to subsidized housing. Moreover, in light of the City's representation to HUD about its use of the program, and its recognition of the program's intended purpose of encouraging dispersal of subsidized housing, the City's choice would appear to be a fully conscious one.

C-1650.[45] Nor did the UDC-sponsored projects fare better. *Id.* Indeed, when Riverview I and II opened in 1975, large numbers of units were kept vacant, and large numbers of minority applicants kept waiting, while unsucceessful efforts were made to attract whites to the projects. That practice eventually led to a complaint filed by the NAACP and a consent decree altering the rental policies. Although efforts to attract whites continued, Riverview became and remained, predominantly minority. C-1650. In addition, the concentration of subsidized housing in Southwest Yonkers is widely viewed to have seriously hindered, rather than helped, the economic revitalization of the area. *See, e.g.*, Tr. 9773 (Pistone); 7688 (Martinelli).

The City contends, however, that its strategy was both reasonable (if unsuccessful) and unrelated to any racially influenced opposition to the placement of subsidized housing elsewhere. In support of its contention, the City points to the testimony of David Portman, its expert witness on urban planning, and to the existence of the City's Community Renewal Plan, a report issued in June of 1970.

Dr. Portman testified that under then-prevailing planning standards it was reasonable for the City to place relocation housing in or near urban renewal areas and to attempt to use subsidized housing to upgrade the neighborhood and attract commercial and private residential development. Tr. 10,207-10, 10,714-20. Dr. Portman disagreed with the opinion of Paul Davidoff, the government's expert, that the concentration of subsidized housing in the Southwest stigmatized the area (thus discouraging private residential and commercial development),

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[45]The eighth project is Highland Terrace, a 96-unit cooperative built in 1968 and granted a 90% tax abatement on the condition that ten of its units be leased to the City for relocation housing — a quid pro quo the City apparently never utilized. C-456; GX 1105.11. The racial composition of Highland Terrace cannot be established from the record since the figures offered in evidence appear to relate to a building that is not at issue in this case. C-1650.

and suggested that in any case, the failure to reinvest would have been perceived as a public abandonment of the Southwest, which would have had an even greater stigmatizing effect. *Id.*

However, Dr. Portman subsequently acknowledged that avoiding the appearance of abandonment did not require that *all* subsidized housing be built in the Southwest, Tr. 10,727-28, 10,744, and that it also would have been reasonable to pursue a middle ground — that is, to put some subsidized housing in the Southwest and some elsewhere. While Dr. Portman declined to express an opinion on whether that alternative would have been preferable, he did acknowledge that as a planner he "probably" would have presented the alternative to the City as something to consider. *Id.* Dr. Portman also subsequently acknowledged that it *would* have been preferable if the City's "seed investment" in the Southwest had not been largely limited to subsidized housing, but had included more in the way of arterial widening and other physical improvements. Tr. 10,834-37.

Dr. Portman offered no opinion on whether the City's confinement of all subsidized housing to the Southwest was in fact related to the strong opposition to subsidized housing that was evident in Northwest and East Yonkers. Nor, in light of his concessions about the alternatives available to the City, does his testimony offer any significant support for a conclusion that the two were, in fact, unrelated.

The second item emphasized by the City — its Community Renewal Plan ("CRP") — was prepared as part of the City's Community Renewal Program, a federally funded study "to measure the intensity of community problems which affect the quality of life in Yonkers and to set forth a systematic program for their elimination or reduction." C-337 at 26601. Plans for undertaking a Community Renewal Program in Yonkers began in March of 1966, and the following summer YURA Director Walter Webdale hired Patrick Kane and his consulting firm, KRS Associates, to assist in the project. C-325; C-328; Tr. 8677

(Kane). KRS was made responsible for project coordination, the physical planning aspects of the study, and the preparation of the CRP. C-337.

The CRP set forth in general terms a long-range program for the redevelopment of the Southwest and a more specific short-range program for the years 1970 through 1975. The recommendations in the short-range program included the use of federal funds to construct subsidized housing in Southwest Yonkers, and the use of the "checkerboard strategy" to maintain an adequate supply of relocation housing . *Id.*; Tr. 8707-08 (Kane).[46]

However, the circumstances of the Plan's preparation undermine its significance as support for the contention that the City's activities during these years were unaffected by racially influenced opposition to the placement of subsidized housing outside Southwest Yonkers. Patrick Kane testified that in formulating the plan he met with City officials and Yonkers residents extensively and learned, *inter alia,* of the City's urban renewal and subsidized housing history, of the "stalemate" that had been created by the lack of relocation housing, and most significantly, of the concerns that existed in East Yonkers with respect to potential change of the "character" of the neighborhood — concerns that Kane understood to include the possibility of "racial alterations of the

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[46]The City has emphasized that most of the sites approved during this period are specifically listed in the CRP. This is scarcely suprising, however, since by the time the CRP was published in June of 1970, the City was already involved in the planning of fifteen of the period's seventeen projects. (The remaining two — Parkledge and Cromwell Towers — are not listed in the CRP.)

Clearly, the relevance of the CRP lies not in the fact that it summarized and sought to explain the City's current urban renewal and subsidized housing activities, but rather in whatever role its principal architect, Patrick Kane, had in guiding those activities, and whether that guidance (if any) suggests that the confinement of subsidized housing to Southwest Yonkers during this period occurred for reasons unrelated to racially influenced opposition to the placement of the housing elsewhere.

homogeneous composition of the community." Tr. 8680-81, 8689-91, 8709-14, 8734, 8787, 8802-03, 8910 (Kane).

Kane testified that he felt "compelled by law and conscience" to disregard the racially influenced fears of East Yonkers residents. Tr. 8910. However, he also acknowledged that those fears made selection of subsidized housing sites in East Yonkers "all but impossible." Tr. 8803. Kane did not recommend the impossible. Instead, he left the question of the racial homogeneity of East Yonkers to another day, Tr. 8706, 8721-22, and focused instead on Southwest Yonkers. Tr. 8737. As a result, while the CRP may suggest that City officials were not entirely alone in their perception of political realities in Yonkers, it does not suggest that the City's actions with respect to subsidized housing were not based, at least in significant part, upon that perception.

Moreover, it is not apparent from the record that Kane's recommendations carried any significant weight with City officials. While there is evidence showing that Kane was in fact involved in a number of the City's planning activities between 1967 and 1970, the various City officials who testified about site selection for subsidized housing during those years did not suggest that the selections were made in reliance upon Kane's advice. Indeed, Walter Webdale dismissed the entire Community Renewal Program as being of little importance to the City's planning efforts, explaining that "[i]t was formally put together, but there wasn't that much cooperation in the City to make it really function as it was designed to function." Webdale Dep. 381-82; *see also* GX 1088.28.[47]

In general, the testimony of the City officials who were closely involved with subsidized housing and urban renewal dur-

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[47]At least on one significant point, the City appears to have rejected the advice of Kane, who testified that Riverview I and II were "not consistent with the objections of the CRP" since they contained only subsidized housing rather than the combination of market rate and subsidized housing that would be required to attract a desirable mix of tenants. Tr. 8773-74, 8863.

ing these years contains little to suggest that the total confinement of subsidized housing to the Southwest was the result of an affirmative plan to use subsidized housing to revitalize the area. Walter Webdale stated flatly that YURA went into the subsidized housing business only because the MHA had failed to provide the necessary relocat housing for the City's urban renewal projects. Webdale Dep. 74-75; 241; 592. And apart from his unsupported suggestion that he was compelled by HUD to limit the agency's housing activities to urban renewal areas, *see* HOUSING IV.D.1 *supr* Webdale's explanation for the confinement of subsidized housing to the Southwest was simply that he believed a "two for one" approach which combined subsidized housing and redevelopment "was the prudent and wise thing to do." Webdale Dep. 244. The respect in which it was "prudent and wise" is suggested by Webdale's further acknowledgement that the public's attitude toward subsidized housing was a "significant barrier" to the City's ability to provide relocation housing, and that he had heard various councilmen say that they wouldn't survive politically if they supported subsidized housing projects in their wards. Webdale Dep. 484-85, 562.

In the same vein, the testimony of Mayor Del Bello conveys primarily an awareness of the urgency of the need for subsidized housing, and of the limitations imposed by community opposition. Although by the time Del Bello took office in January of 1970 there had been some progress made toward removing the relocation "roadblock" to the City's Stage II urban renewal project, the need for subsidized housing as a relocation resource remained acute. In addition to Stage II, the planned clearance for the Otis expansion was estimated to require the relocation of some 1,000 families, and there were other projects in the works as well. Tr. 1326-30 (Del Bello); 835-37 (Yulish). Moreover, as Mayor Del Bello explained, the City "had people living in desperate, horrible conditions," and he contended that "the best thing [they] could do as public officials was to get them in safe, decent standard housing." Tr. 1214-15; *see also* Tr. 834 (Yulish); 8707 (Kane);

Lenaz Dep. 18, 23, 37 (describing "tremendous sense of urgency" communicated by the Del Bello administration to the UDC in early 1970).

Although Del Bello testified that subsidized housing was intended to play a role in the City's redevelopment strategy by stopping the spread of blight in the Southwest, Tr. 1326, he did not suggest that it was for that reason that subsidized housing was confined to the Southwest. To the contrary, as noted earlier, Del Bello acknowledged that the reason sites in the Southwest were the only ones chosen was that "councilmen wouldn't approve sites in any other areas." Tr. 1193.

Also noteworthy, as suggested earlier, is the apparent absence of discussion or debate among City officials about the proper location of relocation housing. Instead, there is only evidence of off-hand remarks which suggest that at least for the time being, discussion was considered unnecessary. At a 1971 CAC meeting, for example, in the course of a discussion about the newly opened Jefferson Terrace, it was suggested that the apparent success of the project be publicized so as to "produce a greater understanding of how the § 236 program works and perhaps help to alleviate some of the opposition to locating these buildings in North and East Yonkers." GX 1079.63. Similarly, at a City Council hearing held that same year, one of the sponsors of Jackson Terrace successfully urged a reluctant City Council to grant the project several variances, arguing that "in light of the announcement of the Federal Authority, in regard to scattered site housing, which, I presume, will tie up this Council for some time in its dilemma, Jackson Terrace may be the only source of housing for some time to come." GX 1082.32; *see also* GX 1090.5; 1108.3; 1189.1.

Particularly conspicuous is the absence of any formal discussion among City officials or with the public about the selection of sites for the 1,200 units of subsidized housing provided for in the City's first Memorandum of Understanding with the UDC. Nor

can that absence be explained by a lack of issues worthy of discussion. To be sure, the agreement offered a massive supply of relocation housing, the need for which few would have disputed. However, there was reason to question whether all of that badly needed relocation housing belonged in and around the downtown area. The agreement added 1,200 subsidized units to more than 500 also in progress for an area that was already considered by the City's Planning Director to be overconcentrated with subsidized housing. GX 1090.5; GX 1093.8; Tr. 2779-82, 2865-70 (Arcaro); 9773 (Pistone). In addition, the Whitney Young site was in an area designed in the Master Plan for industrial re-use and was considered by Planning Director Pistone to be an "excellent" industrial site. Tr. 9822. Had he been consulted about the site, Pistone testified, he would have opposed it on that ground. *Id.* Similarly, the sites for the Dorado and Frazier Arms were in areas designated for commercial and industrial re-use, and one of the sites had been rejected by HUD a few years earlier on the ground that it was unsuitable for residential use. C-583.

In addition, while at least some City officials may have considered the rejection of wholly commercial re-use for the Stage II urban renewal area long since settled (although Pistone testified he attempted to persuade newly elected Mayor Del Bello to reconsider the issue, Tr. 9877), it is nonetheless peculiar that the decision to abandon previous plans for a half-commercial re-use, and instead double the amount of housing, was made without any apparent formal or public discussion. The only apparent public debate of the decision came several years later in 1972 when members of the Yonkers Economic Development Corporation attempted to prevent construction of the 343-unit Riverview II, proposing instead a commercial "superblock". Cola Dep. 38, 42. By that time, however, the City was either unwilling or unable to reconsider plans for the area.

Equally deserving of discussion was the reasonableness of expecting Riverview to lure middle-income whites back to the

Southwest. The City points to the success of Phillipse Towers, the Mitchell-Lama project just across the street from Riverview, as reason for optimism about Riverview's own chances of success. And in fact, Phillipse Towers was, at that time, widely viewed as a well-integrated and well-managed complex, which had exerted a stabilizing influence on the neighborhood.

However, the circumstances of Riverview's construction were clearly different. It was to be part of a large infusion of subsidized housing in and around the downtown area (500 privately sponsored units and 1,200 UDC-sponsored units), and a substantial minority tenancy for that subsidized housing was virtually certain. *See, e.g.*, Webdale Dep. 54-55. Indeed, a UDC memorandum prepared along with the draft agreement in April of 1970 described the first round UDC projects as helping to provide relocation housing for the nearly 1,000 black families living in substandard housing in the general area. GX 1088.8. Yet, there is no evidence of any formal or public discussion about the possible effect of these circumstances on Riverview's ability to attract white tenants.[48]

Moreover, Phillipse Towers was a middle-income project while Riverview was, at the time of Council approval, partly low-income and mostly undetermined. The July 1970 Memorandum of Understanding called for a mix of 20% low income, 10% low income elderly, and 70% to be "primarily" middle income with subsequent market studies to determine the percentage of moderate income and conventional units, GX 1088.12. However, a UDC marketability study completed in April had already deter-

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[48]The only evidence of discussion of these issues among City officials is a conversation vaguely recalled by Planning Director Philip Pistone between himself and City Manager Scher, which occurred at some point before final approval of the Memorandum of Understanding. Tr. 9884-85, 10,022. According to Pistone, Scher asked him whether he thought Riverview was likely to be successful in attracting middle-income whites back to that area of Yonkers. Pistone replied that once the families left, they were unlikely to return. Scher agreed, but said the City should try nonetheless. *Id.*

mined conventional units to be "completely unmarketable" and middle-income units unmarketable on any significant scale. C-606. Yet, there is no evidence of any discussions among City officials about the wisdom of approving a project without a firmer indication of the type of housing that would be put there, nor evidence of any studies or discussions about the effect of changes in income mix on the likely tenancy. Instead, as noted earlier, the UDC agreement was simply presented to the YURA Board and approved without apparent debate, and approved by the City Council the following day. *See* HOUSING IV.C.2 *supra*.

We do not find, as plaintiffs have suggested, that these circumstances indicate that the City had no intention of attempting to attract an integrated tenancy to any of the projects, or that it had no genuine hope (however ill-founded) of successfully doing so. There is credible evidence that efforts were made (apart from the practices that gave rise to the NAACP complaint), and that hope did in fact exist for creating something other than an "unsalvageable ghetto." GX 1978,32; *see, e.g.*, Tr. 10,157-59, 10,182-83, 10,196-97 (Bogdanoff).

However, a policy of excluding minorities from all areas of a city except one cannot be justified by attempts to encourage integration in the remaining area, *see, e.g., Gautreaux* v. *Chicago Housing Authority, supra*, 296 F.Supp. at 914, and it is clear that the City's actions with respect to subsidized housing during these years were motivated, at least in part, by such a policy. The circumstances under which the City acted, taken together with the testimony of its own former officials, permit little doubt that the role which subsidized housing came to play in Southwest Yonkers during these years was, in significant part, the result of perceived necessity — due to racially influenced community opposition to the placement of the housing elsewhere — rather than nondiscriminatory design.

Our conclusion in this regard is reinforced by the circumstances leading up to the City's approval of the RAMP site in

order to satisfy HUDS's requirement that a "scattered" housing site be approved. On the record before us, the selection of the RAMP site cannot persuasively be explained as part of a strategy to rebuild the Southwest, nor as the result of the unavailability of East side sites, but only as an indication of the extreme degree to which community support (and therefore City Council support) was lacking for the placement of housing equated with minorities in East Yonkers.

V. THE CITY'S ACTIVITIES UNDER THE HOUSING AND COMMUNITY DEVELOPMENT ACT OF 1974

In the years following the Riverview period, in response to continuing federal pressure, the City's planners made several attempts to promote at least some dispersion of subsidized housing in Yonkers. The discriminatory pattern of previous years continued, however, and at virtually every turn, their efforts were opposed by the City Council. The result has been the continued concentration of all subsidized housing for families, and virtually all subsidized housing for senior citizens, in Southwest Yonkers.

A. Subsidized Housing Under the Housing and Community Development Act of 1974

With the enactment of the Housing and Community Development Act of 1974 (HCDA), the major federal urban renewal programs were replaced by the Community Development Block Grant (CDBG) program, under which a community may apply for annual block grants to be used for community development activities such as slum clearance and infrastructure improvement. Among the requirements for CDBG eligibility is the development and approval by HUD of a Housing Assistance Plan (HAP) for the community. The HAP surveys the housing conditions in the community; describes the housing needs of lower income households, and specifies the type and location of housing assistance to be provided. One of the goals of the HCDA is to promote

dispersal of subsidized housing opportunities (particularly for minorities), and one of the criteria by which a HAP is judged is the extent to which it furthers that goal. *See, e.g.*, Tr. 9802, 9934-35 (Pistone); 10,465-66 (Yost); 6335-36 (Diamond). A grantee's performance under the CDBG program is measured, in part, by the efforts made toward providing the housing assistance specified in the HAP.

The primary program for housing assistance under the HCDA is the Section 8 Program, under which rental subsidies are paid to a landlord on behalf of eligible tenants. The Section 8 program is subdivided into several categories: new construction, substantial rehabilitation, moderate rehabilitation, and existing housing. Under the new construction and rehabilitation programs, development proposals are made directly to HUD in response to the publication of a Notice of Funding Availability (NOFA). The local government is then invited to review the proposal for consistency with its HAP and to offer any other comments it may have. The review is generally known as a § 213(a) review (a reference to the provision of the HCDA which requires it).

Under the Section 8 Existing Program, a local housing agency applies to HUD (again in response to a NOFA) for a certain number of Section 8 Existing Certificates for distribution to eligible families or individuals. Certificate holders can then use the certificates to obtain an apartment from a landlord willing to accept the certificates in lieu of a designated portion of the rent, which is then paid by the local housing authority on behalf of the certificate holder.

B. The Section 8 Existing Program

In March of 1975, the City submitted its first Housing Assistance Plan (HAP). C-1086. The Year I (1975-76) HAP identified — as would all subsequent HAPs in evidence — significant needs for subsidized housing among both the senior citizen and family populations in Yonkers. *Id.*; C-1087 through C-

1091. The basic strategy proposed in the Year I HAP to work toward meeting those needs was new construction of subsidized housing for senior citizens in East Yonkers; rehabilitation of existing structures for families primarily in Southwest Yonkers; and the use of Section 8 Existing Certificates by both families and senior citizens. C-1086. With respect to the lattermost, the Year I HAP called for the City to apply for 100 Section 8 Existing Certificates to be split equally among senior citizens and families.

As City officials acknowledged at trial, the fifty Section 8 Existing Certificates represented the sole aspect of the Year I HAP that offered any significant chance of dispersing at least some subsidized housing for families into the overwhelmingly white neighborhoods of East and Northwest Yonkers. Tr. 10,430-36 (Yost); 7348 (Yodice). It was also one of the first aspects of the HAP to be rejected by the City Council. That rejection, together with the City's subsequent actions with respect to the Section 8 Existing Program, provide what may be the single most persuasive indication of the degree to which segregative intent has figured in the City's subsidized housing activities.

In August of 1975, in response to word from HUD that 100 Section 8 Certificates had been set aside for Yonkers, City Manager J. Emmet Casey submitted the City's application for the certificates. GX 1164. Several weeks later, on September 2, 1975, Casey sent a memorandum to the Mayor and the City Council requesting official authorization for the City to participate in the program, and urging the Council to act expeditiously so that HUD would not reallocate the certificates to another community. GX 1104.7. (The Mayor was now Angelo Martinelli, who had defeated Mayor Del Bello in the 1973 election, and who had campaigned as an opponent of any additional construction of subsidized housing in Yonkers. Tr. 7432-33.)

On September 10, 1975, the City Council met, and on the motion of Councilmember Walsh, referred the matter to committee. GX 1104.9. Alphons Yost, who had succeeded Morton

Yulish as the Administrator of DOD, and who also headed the Yonkers Community Development Agency (formerly the Yonkers Urban Renewal Agency), testified at trial that it was apparent to him at the September 10th Council meeting that the Council would not authorize the City's participation in the Section 8 Existing Program. Tr. 10,521-22. Nonetheless, in the City's § 213(a) review submitted the following month, Casey told HUD that the application for fifty senior citizen and 50 family certificates was consistent with the City's HAP and "fully supported by the City administration." GX 1104.10.

On November 14, 1975, HUD notified Casey that the City's Section 8 Existing application had been conditionally approved subject to the receipt within ten days of a resolution by the "governing body of the Agency authorizing participation in the Section 8 program." GX 1104.15. Yost asked the CDA's attorney whether a resolution from the CDA Board would suffice, but was told that it would not. GX 1104.16; 1104.17.

Two months later, on January 21, 1976, Yost reported in a memorandum to City Manager Casey that HUD had told him that unless the City Council passed a resolution authorizing the City's participation in the program on or before the first week of February, the 100 certificates would "in all probability" be reallocated to another community. GX 1104.17. Yost also noted that the "Council [had] been agonizing over this aspect of our Housing Assistance Plan for some time and [had] not come to a conclusion as to their dispositional desires." *Id.*

On January 27, 1976, the City Council met and voted seven to six against authorizing the City to participate in the Section 8 Existing Program. Mayor Martinelli who attended the meeting and voted against the program, testified that he had no recollection of any discussion that may have preceded the vote. Tr. 7491-96 (Martinelli). Alphons Yost likewise professed to recall little about the Council's position on the issue. Tr. 10,522-32.

Others, however, testified that the Council's opposition was based on the geographic mobility the program would give to those of low and moderate income. City planner Gregory Arcaro, for example, testified that while there was little public discussion of the program, there were numerous informal discussions with City officials, and that he was asked more than once whether it was true that the City would have no control over where the certificates were used. Tr. 2848-57. People would ask, Arcaro explained, whether the certificate holders could in fact "go anywhere," including buildings in East Yonkers. *Id.* Arcaro testified that he was told by Yost and the City Manager that some councilmembers opposed the program because of its mobility, but that he could recall little specific discussion as to why, "other than what we probably knew in our heads." Tr. 2855-56; *see also* Tr. 10,325 (Hanney). Herman Keith, a CDA employee who also attended the January 27th meeting, confirmed that the basis of the objections to the program was that the certificate holders could "seek housing anywhere in the City." Tr. 8415-16. Keith also testified that he believed that those who objected to the program were concerned that minorities would move to East Yonkers. *Id.*

Also in attendance at the January 27th meeting was Winston Ross, then president of the Yonkers Branch of the NAACP, who spoke in favor of the program. Tr. 3833-34. Ross testified that in the discussion preceding the vote, a number of councilmembers stated that they were opposed to the use of Section 8 Existing Certificates for families in their wards, and that at least one opposing councilmember likened the program to scattered site housing. Tr. 3834-36. Five of the six councilmembers who joined Mayor Martinelli in voting against the program represented wards that were totally or partly east of the Saw Mill River Parkway. Tr. 3836; GX 1104.3.

Two days after the vote, Ross sent a letter to each of the councilmembers who had voted against the Section 8 Existing

Program urging them to reconsider. GX 1104.3. The letter stated that:

> In a time when there is a desperate need for adequate and safe housing for the elderly and low-income families to reject a program that doesn't cost the City of Yonkers and provides some relief for a number of citizens shows an insensitivity to their needs.
>
> Section 8 Existing Housing Program would aid families in finding decent housing without affecting the city's tax base through tax abatements as in other subsidized programs. To raise the issue of "scatter site housing" when speaking of 100 units equally split between low-income and elderly Yonkers residents shows a lack of understanding of housing concepts and smacks of racism.

Id.

A memorandum sent the same day from Alphons Yost to City Manager Casey (with copies to the Mayor and various councilmembers and other City officials) reported that on the day after the Council vote, Yost told Jed Abrams, a HUD official, that he "was having difficulty in getting the administration to go along with" the Section 8 Existing Program as outlined in the Year I HAP. GX 1104.19. Yost told Abrams that since the HAP "placed heavy emphasis on senior citizen domiciles through new construction and since no new construction has been started under Section 8, due to a lack of mortgage monies, we felt that we must therefore change the specified needs" to 100 Section 8 Existing Certificates for senior citizens. *Id.*

Yost reported that Abrams' initial reaction was that the change "might require a major revision to the plan necessitating a long term reviewing process," but that after consultation with his superiors, Abrams suggested an "alternate solution." Yost's memorandum stated that:

> The alternate solution suggested was one in which the City would request, through Council resolution, that the 100 units for existing housing in the first year's application be allocated to senior citizens only and with a back-off alternative being that the 50 units presently specified in the HAP for senior citizens be authorized with no action to be taken on the 50 units earmarked for families.

Id. Yost observed that "with these conditions the councilmatic objections should be somewhat abated," and urged that since the issue "turned into a major discussion item" at the last Council meeting, a committee meeting be held "as soon as possible." *Id.*

But despite HUD's apparent willingness to accommodate "councilmatic objections" to the use of the Section 8 Existing Program for families, Yost expressed concern about the possible consequences of the City's actions. The following month, in February of 1976, Yost wrote a memorandum to Deputy City Manager Vincent Castaldo, enclosing a recent national housing newsletter which he described as "clearly indicat[ing] how seriously HUD considers the dictates of the" HCDA and "also reflect[ing] HUD's concern [that] low income housing [not be limited] to sub-standard areas." GX 1104.21. The memorandum then went on to recount the Council's rejection of the Section 8 Existing Program, and warned that "[i]f this matter is not resolved in a way that HUD feels comfortable with we would be putting all subsequent CD monies in jeopardy." *Id.*

Castaldo distributed copies of Yost's memorandum to Mayor Martinelli and City councilmembers. P-I 171-19. Castaldo's covering memorandum stated simply that:

> I am transmitting herewith copy of letter from Department of Development Director, Al Yost, concerning Section 8 Housing and how it may affect the block grant to the Community Development Agency.

> As soon as we have received final information from HUD, I will advise you further.

Id.

By mid-March of 1976, the Council had not taken any further action with respect to the Section 8 Existing Program, nor, apparently, had HUD acted upon a written request by Yost for "HUD's official response" to the City's plan to alter its Section 8 Existing application from fifty senior citizen and fifty family certificates to 100 senior citizen certificates. GX 1104.20. On March 19, 1976, Yost wrote a memorandum to Castaldo (who had since become City Manager) outlining the results of some thinking he had done about the Section 8 Existing Program "and the qualms of certain of the Council relating thereto." GX 1104.23.

Yost's memorandum began by noting that "the Section 8 Existing Program does not require that people be moved from one place to another, so there should be no concern on that score on the part of the Council." *Id.* That fact, Yost suggested, plus HUD's apparent willingness to convert all the Section 8 Existing Certificates called for in the Year I HAP to certificates for senior citizens "should be sufficient for councilmatic approval." *Id.*

Noting, however, that the Council "unfortunately" had yet to give that approval, Yost suggested another means of "sweeten[ing] the pot." *Id.* He suggested that "each councilman be allowed to recommend to the Agency eight worthy individuals in their respective Wards who qualify for the Section 8 Existing Program and the Agency would give those people priority such that each Councilman could get full credit for whatever his involvement turns out to be." *Id.* "With this kind of a program," Yost concluded, "I feel that even the allocation of fifty family and fifty elderly units becomes viable since the apportionment of each would be made by the councilman involved." *Id.*

On April 27, 1976, eight months after the City's original application for Section 8 Existing Certificates, the City Council voted nine to three to authorize the City to apply for 100 Section 8 Existing Certificates for use by senior citizens. GX 1104.26. On May 12, 1976, HUD notified the City that it would be awarded 50 certificates for senior citizens (the amount originally provided for in the Year I HAP). GX 1104.31.

The City's Year II and Year III applications for the Section 8 Existing Program were likewise limited to certificates for senior citizens.[49] Not until 1978 did the City apply for any Section 8 Existing Certificates for families. And even when it finally did so, relatively few were put into use, and fewer still put into use outside of Southwest Yonkers. As of February 1982, only thirty-six certificates for families were in use (out of at least 120 awarded to the City), and only three were in use outside of Southwest Yonkers. GX 1225.38.[50]

In addition, not a single certificate held by a minority member (whether family or senior citizen) was in use outside of Southwest Yonkers. *Id.* All twenty-seven of the minority holders of family certificates lived in Southwest Yonkers, as did all forty-three of the minority holders of certificates for senior citizens. In contrast, twenty-four certificates were in use by whites outside Southwest Yonkers. *Id.*

The City contends, and indeed has represented to HUD, that it has made significant efforts to encourage landlords in non-minority areas to participate in the Section 8 Existing Program. *See, e.g.*, Tr. 6715-17 (Forman). However, there is no evidence in

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[49]On April 30, 1976 (while the Year I application was still pending), the City submitted its Year II application for an additional 100 certificates for senior citizens, GX 1104.29. The application was approved in September of that year. C-1299. In April of 1977, the City submitted its Year III application for an additional 45 certificates for senior citizens; none was awarded. C-1307.

[50]The number of family certificates awarded but unused may in fact be even higher. *Compare* Tr. 7332-35 (Yodice) *with* C-1334.

the record of any significant outreach to East Yonkers landlords.[51] Fred Stillman, for example, who owned or managed a number of apartment buildings in East Yonkers and who was well known to City officials because of his involvement in the management of Seven Pines and Riverview II, testified that he has never been approached by City officials about possible participation in the Section 8 Existing Program. Stillman Dep. 6-8, 127. In addition, and more significantly, a City official acknowledged at trial that a list of contacts presented to HUD as evidence of the City's efforts to expand the use of the Section 8 Existing program by minorities in non-minority areas consisted of a list of buildings in Southwest Yonkers. Tr. 7391-93 (Yodice); *see also* Tr. 6715-17 (Forman).

Moreover, the CDA's general record of administering the Section 8 Existing Program was so poor that HUD made repeated efforts from 1979 to 1981 to persuade the City to transfer the program (together with what remained of the Section 23 Leased Housing program) to the MHA, even at one point conditioning an award of Section 8 certificates upon the transfer. GX 1104.70, *see also* GX 1104.68, GX 1104.72; Tr. 7142-43 (Abrams). Yet, the City strenuously and successfully resisted the transfer, arguing to HUD, *inter alia,* that the CDA was "more responsive to the elected officials of the City." GX 1125.8, at 32,234; *see also* GX 1125.4 through GX 1125.7.

City officials were well aware of the possible consequences of failing to comply with HUD's wishes. CDA official Joseph Pacitto warned the City Manager in 1979 that if the transfer was

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[51]The City has offered evidence of advertising flyers sent to employers and community organizations in various parts of Yonkers. *See* C-1327 through C-1333. However, in light of the testimony of Yvonne Nargi, who served as a housing specialist for the Yonkers Commission on Human Rights from 1981 to 1983, such efforts can hardly be characterized as an outreach likely to be successful. Nargi testified that East Yonkers landlords were reluctant to accept Section 8 Existing Certificates unless "mandated" to do so — a reluctance she ascribed to their feeling that "the element would be completely different in that community." Tr. 8096-97.

not effected the City was risking the loss of a significant amount of future federal housing assistance, a loss he contended would be

> tragic and unfortunate. When you consider that there is a waiting list of over 800 people requiring Section 8 Existing Housing assistance, we will be denying these people what they deserve and desperately need.

GX 1125.5. Yet, the City Council defeated the legislation necessary to effect the transfer by a vote of ten to two, GX 1125.7, and even subsequently passed a second resolution affirmatively opposing the transfer. GX 1125.8, at 32,222.

In addition, when the MHA itself applied to HUD in 1981 for 105 Section 8 Existing Certificates (fifty-seven for families; forty-eight for senior citizens), the City strongly objected. GX 1125.9 through GX 1125.13. The City Council passed a resolution declaring that the MHA's authority to provide low-income housing assistance was limited to senior citizens, and in its § 213(a) review of the application, City Manager Fox notified HUD that the City "disapprove[d]" the MHA's application based upon the "policy directive" reflected in the City Council's resolution. GX 1125.12.

The City's actions with respect to the Section 8 Existing Program are inexplicable except by reference to the anticipated race of the certificate holders. Throughout the years in question there was a serious (and indeed, in the words of at least one City official, "desperate") need for Section 8 Existing Certificates for families as well as senior citizens. GX 1125.5; *see also, e.g.*, Tr. 10,469-71 (Yost); C-1086 through C-1091. In addition, the certificates were a form of assistance that imposed no financial burden on the City. No tax abatement was required, as in the case of most subsidized housing projects, and included with the grant of the certificates were funds payable to the City for the cost of administering the program. Tr. 2853 (Arcaro). Moreover, like the Section 23 Leased Housing Program, Section 8 Existing Certifi-

cates offered a way to disperse low income housing without adding to the density of a neighborhood (as a subsidized housing project might) and without raising any other real or imagined physical planning problems.

Yet, for three years, the City refused entirely to apply for Section 8 Existing Certificates for families; failed to use many of the certificates eventually applied for; failed to make any significant efforts to promote their use outside Southwest Yonkers; sought to conceal from HUD the extremely limited geographic scope of its outreach efforts; resisted efforts by HUD to transfer the program to an agency perceived by the City to be less "responsive to elected City officials"; and opposed the efforts of that agency to obtain certificates on its own.

In pursuing those actions, the City consciously forfeited badly needed federal housing assistance, consciously risked even greater forfeitures of federal assistance, and consciously avoided an opportunity to lessen the severe concentration of subsidized housing and minorities that existed (and exists today) in Southwest Yonkers.

The various attempts the City has made to explain its actions on race-neutral grounds are plainly inadequate and at variance with the record. The City has contended, for example, that the City Council insisted on a Year I application of 100 senior citizen certificates because it had determined the need for senior citizens to be "more compelling." However, there is no evidence that this was the basis of the Council's actions, and considerable evidence to the contrary. Moreover, the City's explanation fails to explain why an application for fifty senior citizen certificates (and none for families) was the acceptable "back-off alternative." GX 1104.19.

Nor can that alternative be explained by a belief among the Council that no need existed for families. There is no evidence that any councilmember held such a belief, and the City's own

HAPs, as well as the testimony of its planners and other officials make clear that such a need indeed existed. *See, e.g.*, GX 1125.5; C-1086 through C-1091; Tr. 2844-53 (Arcaro); Tr. 10,469-71 (Yost).

Equally unsupported in the record, and equally implausible, is the City's suggestion that the City Council declined to participate in the Section 8 Existing program for families because it "recognized that HUD's rent guidelines were inadequate to attract" landlords of units large enough for families. The testimony and memorandum of HUD's Area Economist Paul Bannett, upon which the City heavily relies, establishes no more than that Bannett told his colleagues at HUD that the City's failure to apply for Section 8 Existing Certificates for families would be entirely indefensible but for the then-current inadequacies in the program's rent schedule. *See* Tr. 6262 (Bannett); C-1291. Such evidence may explain why HUD did not exert more pressure on the City to apply for the certificates. (Although in that respect it must be evaluated together with HUD's troubling willingness to accommodate "councilmatic qualms" about the mobility which the certificates gave to recipients of housing assistance. *See* GX 1104.19.) But that evidence in no way suggests that concerns about inadequate rent schedules motivated the City's actions. In addition, it is hard to believe that such a concern would have militated against accepting housing assistance that was readily available and cost-free to the City.

Nor can we accept the City's suggestion that rent schedules alone explain the current distribution of Section 8 Existing certificates in Yonkers. Even if the current concentration of certificates in the Southwest were largely attributable to the greater number of apartments there that are within the program's price range (and on that point the record is unclear), rent schedules do not explain why it is that the only certificates in use outside Southwest Yonkers are held by whites.

When City officials first learned about the Section 8 Existing program, they expressed concern that it would "wrest[ ] away" the local control enjoyed under the § 23 leased housing program (in which City officials selected the buildings the tenants would live in). GX 1104.1; *see also* GX 1104.11. And early consideration was given to the prevention of its use in East Yonkers by "problem families." GX 1176.23. The events described above make abundantly clear that the families who represented a "problem" to the City Council were minority families, and that (at the behest of the City Council) the City initially resisted participation in the program because it gave minority families the potential ability to relocate to East Yonkers. The record also strongly suggests that when it was clear this potential ability could not, in all likelihood, be realized without significant City assistance, the City intentionally withheld the assistance needed to enable to program to serve as a tool for integration, and resisted efforts to transfer the program to an agency that might do otherwise.

Even if no other evidence of discriminatory actions were available with respect to the post-Riverview period, the evidence concerning the Section 8 Existing program alone would be sufficient to satisfy plaintiffs' burden of proving that the pattern and practice of discrimination evident in previous years has continued up to (and indeed past) the filing of the present action. However, the Section 8 Existing program is by no means the only evidence available in this regard.

C. Section 8 New Construction Housing for Senior Citizens

1. The City's Actions

The City's actions with respect to the location of Section 8 new construction housing for senior citizens provide additional evidence that the pattern of previous years continued. Here, too, initial efforts by the City's planners to disperse the housing were opposed by the City Council.

In explaining the designation of East Yonkers for new construction for senior citizens, the Year I (1975) HAP noted that 97% of the City's subsidized housing was located in Southwest Yonkers, and that choosing East side sites would "minimize relocation, and offer greater selectivity in housing accommodations." C-1086 at 25,053. The HAP also stated that:

> West Yonkers locations would be acceptable *only* if very favorable design, locational and neighborhood impact considerations could be demonstrated. Developers must be aware that solicitation for Section 8 subsidized new construction outside the East Yonkers areas must have the most compelling of design, locational and neighborhood arguments in order to be placed into consideration.

Id. (emphasis in original).

Three months after the Year I HAP was submitted, however, the City Council passed a resolution purporting to amend the HAP to specifically include a proposed site on Highland Avenue in Southwest Yonkers, and directing that the resolution be forwarded to HUD. GX 1112.5; 1112.9. When HUD nonetheless appeared reluctant to process the proposal, DOD Director Alphons Yost sent HUD another copy of the Council resolution "to reaffirm the intention of the City Council to recommend that [the Highland Avenue site] be approved." GX 1112.10. Yost's letter also "reminded" HUD that the City's Year I HAP "allows for Section 8 developments in unspecified areas of West Yonkers" but omitted to mention that the HAP also stated that such sites were to be considered only upon "the most compelling of design, locational and neighborhood arguments." C-1086. Yost sent a copy of the letter to the would-be developer of the Highland Avenue site, stating that the City would immediately initiate and process a [formal] amendment to the Year I HAP and "guarantee[ing] that the Year II HAP would 'specifically include' the Highland Avenue site," as indeed it did. GX 1112.11; C-1087.

The City's strong support of the Highland Avenue site was by no means a response to "the most compelling of design, locational and neighborhood arguments" in its favor. When the developer first approached DOD Director Yost with his proposal, Yost discouraged him, explaining that it was DOD's goal to disperse subsidized housing through East Yonkers. GX 1112.1. Yost simultaneously conceded, however, that DOD "had a long way to go before that became the City policy," *id.*, and the developer (thus alerted) successfully appealed to Mayor Martinelli for support. *See, e.g.*, GX 1112.1; 1112.5; 1112.11. The subsequent support came despite a highly negative review of the proposal by the City's planners, *see* GX 1112.3, and the site's inclusion in the Year II HAP was, according to an internal City memorandum written by Yost, "dictated by [the] City Council." GX 1190.10.

Nor was the City Council's influence limited just to the addition of the Highland Avenue site. In that same memorandum, Yost observed that "[s]ince we seem to be lacking in support for senior citizen's developments in East Yonkers, I believe a review of other appropriate sites in West Yonkers would be appropriate." *Id.* Accordingly, the Year II (1976-77) HAP listed four acceptable Southwest sites and deleted the language requiring the "most compelling of arguments" before a Southwest site would be considered. C-1087. The unsurprising result has been that all of the Section 8 new construction projects for senior citizens that were built during this period (including several projects strongly criticized by the City's planners) are in Southwest Yonkers.[52]

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[52]Those projects are the Lane Hill Apartments (109 units); Monastery Manor (146 units) (initially a Section 8 proposal and eventually funded under another federal program); St. Casimir's (264 units); and Kubasek-Trinity Manor (130 units). *See* Appendix A. On the planning objections raised to St. Casimir's and Monastery Manor, *see* GX 1139; 1100).

Ironically, the would-be developer of the Highland Avenue site apparently lost interest in the site after HUD's initial rebuff of his proposal. The site was

(Footnote 52 continued on next page)

The history of Midland Mews, a proposal rejected by the City in 1975, suggests the extreme degree to which support was in fact lacking for east side sites, and also confirms that (as in previous years) race was a factor in that lack of support.

The Midland Mews proposal, which would have provided some forty units of housing for senior citizens on Midland Avenue in East Yonkers, was presented to the City at a meeting between the developer, the architect, and City planning officials in January of 1975. GX 1113.1. In a memorandum to the files written several days later, Lawrence Blumenthal, Deputy Development Planning Director, noted that the proposal had been well received by City Planning officials:

> The housing . . . is properly scaled in its juxtaposition next to single family homes. It makes a fine transition from a S-50 [single-family] to a B [business] zone. The building will require minor variances for parking — to allow ten percent parking as is customary for the Elderly rather than 150 percent as required, and a reduction in the allowable square feet per unit. Pistone believes these requests are justified.

(Footnote 52 continued from previous page)

proposed for development again in 1978, however, triggering another struggle between the City's planners and the City Council, with the same outcome. By 1978, when the new proposal was made, the City's planners had regained some of the territory lost in the Year II HAP changes. *See* Tr. 2927-28 (Arcaro). The current (i.e., Year IV HAP) no longer included a listing of Southwest sites and even specifically excluded (on grounds of overconcentration of subsidized housing) the census tract in which the Highland Avenue site was located. C-1089. In the City's section 213(a) review of the proposal, filed with HUD in August of 1978, the City Manager urged "most strongly" that the project be disapproved as inconsistent with the City's HAP and "detrimental to the physical and financial integrity" of the area. GX 1112.17. Like his predecessor, however, the developer successfully appealed to Mayor Martinelli for support. GX 1112.19; 1112.21. In November, the City Manager wrote to HUD withdrawing — without explanation — the City's objections to the proposal. GX 1112.10. In July of 1979, the City Manager wrote to HUD again, affirming the City's support for the project, and declaring it to be consistent with the numerical goals of the City's HAP. GX 1112.25. (The project's inconsistency with the HAP's locational controls was not mentioned.) The present status of the proposal is unclear.

> The Planning Branch [of DOD] and the Planning Bureau [headed by Pistone] agree that the site is well suited for housing for the Elderly vis-a-vis public transportation, shopping, recreation, etc. as well as its location in the eastern half of the city.

Id.

Despite the views of the City's planners, however, the Zoning Board of Appeals twice denied the necessary parking variance at meetings attended by area residents who spoke against the project.

Most of the objections raised had little to do with the number of off-street parking places provided for in the proposal. At the first session in June of 1975, when the issue finally came up for discussion at 1:00 A.M., area residents made clear that they were opposed to the entire idea of the project. GX 1113.4; GX 1197.2. One neighborhood spokesman contended, for example, that the project was simply "incongruous with the character of the neighborhood, like wearing a high hat and turtle-neck sweater at a formal ball." GX 1197.2, at 53. He also contended that traffic congestion was inevitable, claiming that while a bus line was nearby, every one in a low-income area "has some kind of jalopie." *Id.* at 415; *see also* 463-68. Another spokesman raised what the City's planners have referred to as the standard litany of inadequacies (proximity to shopping, churches, etc.), *id.* at 463-66, which, judging from the planners' memo on the proposal, had little or no basis in fact. GX 1113.1; *see also* Tr. 2805-08 (Arcaro).

Comments at the second Zoning Board session similarly suggested concern with the effect of putting "low income" housing (even for senior citizens) in the area. One spokesman from the earlier meeting returned and contended that the housing would become a "tenement" and create "the seeds of a ghetto," and even predicted that "Ashburton Avenue [a heavily black area

of the Southwest] will probably move up there en masse." GX 1197.3 at 568.69. Another speaker protested as a "witness for the last few years [of] what has been happening in the areas of Yonkers where the houses are being deteriorated, [and where there is] more crime." *Id.* at 584. Another also referred to Ashburton Avenue and declared that the developer wanted to "build another slum." *Id.* at 585; *see also id.* at 590. The area's ward councilman also attended the meeting but declined an invitation to speak, saying that the Corporation Counsel had advised him the variance would have to be passed by the City Council as well, and that he would then "have the opportunity to protect [his] constituents through [his] choice on the Council." *Id.* at 592.

One possible explanation for the stated concerns that "Ashburton Avenue" would move to the project may be found in the fair housing statement which the developer filed with HUD, in which he indicated that he hoped to attain a 20% minority representation in the project by attracting "[e]lderly blacks and Puerto Ricans who are now located in west Yonkers." GX 1113.2. In addition, planner Gregory Arcaro testified that concern was expressed at the Zoning Board hearing that the housing might be converted into housing for families. Tr. 2808.

In any event, the opposition of City officials likewise appears to have had little to do with planning considerations. The type of parking variance sought, but twice refused for the project, had been and would continue to be routinely granted for senior citizen projects in the Southwest. *See, e.g.*, Tr. 2951-52 (Arcaro) (citing St. Casimir's, Father Finian Sullivan Towers, Lane Hill, and Monastery Manor as examples). Moreover, the City's planners and (at least with respect to the second variance application) the City's traffic engineer believed the number of parking spaces provided for by the plan was adequate. GX 1113.1; GX 1113.5; Tr. 2951-52 (Arcaro).

Significantly, the number of parking spaces provided by the plan was not even mentioned by the City in its § 213(a) review of the proposal. GX 1113.8. Instead, the City criticized the project on the ground that it lacked nearby shopping, was adjacent to single family homes, was of an inappropriate scale and height, and was "undesirable" for senior citizens because of an "unsightly car lot" nearby. *Id.* The City's characterization of the proposal thus is directly inconsistent with the conclusions of the City's planners as reported in Blumenthal's January memo. *Compare* GX 1113.1 *with* GX 1113.8.

Nor is there any evidence that the planners had reconsidered their earlier views. Instead, there is simply a memorandum from DOD Director Alphons Yost to planner Gregory Arcaro, written shortly after the second Zoning Board meeting, directing him to "set up whatever meetings you feel are appropriate to establish the City's position *against* this particular proposal." GX 1113.7 (emphasis added). At trial, Yost contended that the City had not become predisposed against the project, but could offer no other explanation for the directive contained in his memorandum. Tr. 10,427-28 (Yost).

2. The Effect of the City's Actions.

The City has argued that under the procedures for funding Section 8 new construction proposals, the final decision with respect to the proposals was, in any case, HUD's. In this regard, the City notes that its negative § 213(a) review for Midland Mews was not binding upon HUD, and that HUD was therefore free to fund the project despite the City's objections, but independently chose not to. Similarly, the City points out that its positive reviews for each of the various Southwest proposals submitted to HUD did not require HUD to fund those projects. In essence, the City argues that its actions were inconsequential.

The argument is unpersuasive for several reasons. First, it unreasonably assumes that the City's review had little or no effect

on HUD's funding decisions. Since the very purpose of the statutorily required review is to allow local input in the decision-making process, it is, as a general matter, unlikely that local opposition to a project would carry little weight. *See, e.g.*, GX 1112.22. Moreover, as the City itself has emphasized, Section 8 funds were scarce, and the competition for them keen. Thus, if two or more proposals were competing for the same pool of funds (as was the case with respect to Midland Mews and the Lane Hill Apartments, a Southwest project supported by the City), it is especially unlikely that the City's support of one and opposition to the other would be inconsequential.

In addition, the argument ignores the potential effect of a City's willingness to lobby for a particular proposal. In this regard, it is particularly noteworthy that two of the Southwest projects constructed during this period were initially turned down by HUD either for lack of funds or on substantive grounds, but continued to be strongly supported by the City and were eventually approved and funded by HUD. *See, e.g.*, C-1196, C-1197, C-1206 (Monastery Manor); P-I 134-14, 134-74, 134-104 (St. Casimir's). There is no reason to believe that if Midland Mews had been similarly supported, it nonetheless would have failed to receive funding.

Finally, the City's argument ignores the effect of its actions on the likelihood that other developers would come forward with east side proposals in the future. Midland Mews was supported by the City planners; required only a parking variance that had been, and would continue to be, granted to Southwest projects; and was fully consistent with the Year I HAP's stated goal of constructing subsidized housing for senior citizens in East Yonkers. Yet, it was rejected by City officials after area residents had made their strong and racially influenced opposition to the project known. Although the City's negative § 213(a) review of Midland Mews sought to assure HUD that it would support a more suitable proposal, GX 1113.8, the City's actions surely made it more likely

that few, if any, other proposals for east side projects would be forthcoming. *Cf.* HOUSING IV.D.2 *supra*.[53]

D. Subsidized Housing for Families Under the HAPs for Years I Through IV

The third basic element of the City's Year I (1975-76) HAP (in addition to the Section 8 Existing Program and new construction of subsidized housing for senior citizens) called for meeting the subsidized housing needs of families through the rehabilitation of existing structures in Southwest Yonkers; no goal for new construction was designated. That approach was repeated in each of the City's next three HAPs as well. C-1087 through C-1089.

Although no explanation is offered in the HAPs for the decision to limit new construction to the construction of subsidized housing for senior citizens, the City has offered a number of reasons in support of that decision. First, the City suggests that the decision to meet family housing needs through rehabilitation was consistent both with the purposes of the HCDA (which encourages rehabilitation of existing structures) and with its own efforts to rebuild Southwest Yonkers. In addition, the economics of housing construction are said to militate in favor of new construction for senior citizen housing and rehabilitation of existing structures for families.[54] Finally, the City contends that both its own planners and HUD's Area Economist Paul Bannett

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[53]And indeed, only one other east side proposal appears to have been made for Section 8 senior citizen housing. The proposal was summarily rejected by the City, ostensibly for physical planning reasons, but in fact chiefly out of concern that the developer's primary interest in the proposal was a tax deduction. *See* GX 1115.14; Tr. 2959-60, 3059-63 (Arcaro).

[54]The City suggests that the special facilities needed by senior citizens (such as ramps and scald guards on the faucets) can be more economically provided through new construction than through rehabilitation of an existing structure. New construction is also more likely to be feasible, according to the City, when the units involved are studio or one-bedroom units rather than the multi-bedroom units needed for families.

determined that in view of the large number of family housing units constructed in the preceding years, and the large number of vacancies in those units, new construction of subsidized housing for families was ill-advised.

With respect to the lattermost point, however, Bannett testified that he was unaware that the vacancies in question were being artificially maintained in an effort to attract white tenants. Tr. 6091-96, 6120-21; *see* HOUSING IV.D5 *supra*. Moreover, former City Planner Gregory Arcaro testified without contradiction that none of the City's planners construed those vacancies as a sign that there was an oversupply of family housing units on the market. TR. 3140-43 (Arcaro). In addition, each of the City's HAPs for the years in question indeed shows a significant need for housing assistance for families in Yonkers. C-1086 through C-1089. Thus, to the extent the City is suggesting that a lack of need led to the lack of new construction for families, we find the argument unpersuasive.

None of the remaining reasons cited by the City for its decision to focus on rehabilitation instead of new construction, or a combination of the two, is implausible. However, those reasons leave the picture somewhat incomplete. As an initial matter, it is clear that in light of the extreme concentration of subsidized housing in Southwest Yonkers, and the heavily minority occupancy of that housing, any additional construction of new subsidized housing in Southwest Yonkers was precluded. Only rehabilitation could be limited to the Southwest. C-1086; *see also* HOUSING V.C.5 *supra*. Thus, the alternative facing the City was not simply a choice between new construction or rehabilitation but also one between Southwest and East Yonkers as the location for future subsidized housing for families.

In addition, although one major goal of the HCDA is indeed, as the City notes, to encourage rehabilitation of existing structures, another is to encourage dispersal of housing opportunities for minorities. *See* HOUSING V.A. *supra*. The strategy adopted

in the City's HAP did little to further that latter goal, and it did even less once the Section 8 Existing Program for families had been deleted. Indeed, no other housing strategy could have been significantly more segregative.[55]

Especially in light of the City's past practice of discrimination in the selection of sites for subsidized housing, it seems unlikely that this effect was unintended. In addition, there are two other factors which further suggest that it was not. First, there is credible evidence that those who developed the Year I HAP believed that the City Council would be unwilling to support the placement of subsidized housing for families in East Yonkers, and thus chose senior citizen housing as the vehicle for addressing HUD's concern that the City promote the dispersal of subsidized housing opportunities. *See, e.g.*, Tr. 2845-46, 2855-58, 3133-38 (Arcaro); GX 1112.4; *see also* Tr. 10,447-48 (Yost).

In addition, the subsequent fate of the Section 8 Existing Program and of the HAP's stated preference for east side sites for new senior citizen housing suggests that that belief was well-founded. Indeed, in light of the City Council's demonstrated lack of support for subsidized housing in East Yonkers, even when limited to senior citizens, and its opposition to participation in the

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[55]The City contends that its additional designation of Census Tract 22.02 in East Yonkers as appropriate for substantial rehabilitation, and its 1978 application for that same area to be designated a "Neighborhood Strategy Area" (under a HUD program that makes funding available for new construction and rehabilitation in areas targeted by the City), are concrete examples of its efforts to provide subsidized housing opportunities for minorities in East Yonkers, and are efforts that failed only because no building owners applied for the substantial rehabilitation funds and because HUD turned down the NSA application.

However, substantial rehabilitation is unlikely to have an integrative effect on a neighborhood unless the buildings to be rehabilitated are unoccupied. In addition, in light of the City's actions with respect to the east side preference stated in HAP for new construction for senior citizens, there is no basis for assuming that the City would have supported a proposal to rehabilitate a vacant building in Census Tract 22.02 either under the general substantial rehabilitation program or the NSA program.

Section 8 Existing Program for families, we find it virtually impossible to conclude that the City's four-year long failure to support new construction of subsidized housing for families was entirely race-neutral. Instead, that failure seems clearly to be a continuation of the City's longstanding practice of excluding subsidized housing from East Yonkers based, at least in part, upon the race of the anticipated occupants.

E. The Palmer Road Site

In 1979, for the first time since the approval of the Curran Court in 1963, the City Council approved a site for subsidized housing that is east of the Saw Mill River Parkway. Like Curran Court, the site approved on Palmer Road between Millard and Ellison Avenues was for some 45 units of senior citizen housing. The project was not a Section 8 new construction proposal. (Despite four years of listing East Yonkers as an appropriate area for Section 8 new construction for senior citizens, the City still had yet to support an east side proposal.) Instead, the Palmer Road site was proposed, along with a site on Willow Street in Southwest Yonkers, by the MHA for public housing for senior citizens. Both sites were approved by the City Council in the summer of 1979. GX 1118.34; GX 1118.45.

The site selection efforts that culminated in the approval of the Palmer Road and Willow Street sites began in December of 1978. In response to a sizable waiting list for Curran Court, the MHA resolved to look into the possibility of building additional public housing for senior citizens, noting however, that an obstacle to doing so was the difficulty of finding "a site in the eastern section of [the] City that would meet the approval of the local legislative body." GX 1118.2.

In March of the following year, the Board of the MHA approved an application to HUD for the reservation of 100 units of public housing. GX 1118.3. The City Council approved the application on the condition that it be limited to public housing

for senior citizens, and also approved a Contract of Cooperation with the MHA that was likewise limited to senior citizen housing. GX 1118.5; 1125.2; 1227. The MHA submitted the application to HUD, indicating that no sites had yet been selected but that they would be outside existing areas of minority concentration. GX 1118.7.

The following month, in April of 1979, the MHA approved three sites for the 100 units of housing. GX 1118.8. Two of the sites — Palmer Road and Boyd Place at Bronxville Road in Northeast Yonkers — were approved unanimously. *Id.* The third site — Willow Street in Southwest Yonkers — was approved by a vote of four to three, with its opponents contending that the area was already "oversaturated" with subsidized housing for senior citizens. *Id.*; GX 1118.12. Shortly after the Boyd Place site was approved, however, the owner placed lumber on the site, and applied for building permits to construct single-family homes. GX 1118.18; 1118.20; 1118.17. Upon learning of the issuance of the permits, the MHA withdrew the site. *Id.*

On May 1, 1979, the Planning Board held a hearing to consider the Willow Street and Palmer Road sites. No opposition was voiced to the Willow Street site, and it was approved unanimously. GX 1118.18. The Palmer Road site, however, proved more controversial. During a lengthy, and at times heated, discussion between area residents and City officials, objections were raised with respect to the inadequacy of parking in the area, the site's distance from shopping facilities, and its location in a floodplain. Area residents insisted they were not "anti-senior-citizen" or (as Emmett Burke of the MHA suggested) "anti-public-housing", but simply concerned about the suitability of the site. *Id.* The Planning Board voted unanimously to defer action on the site.

Several days later, in a letter to the President of the Longvale Homeowners Association, who had spoken against the project at the Planning Board hearing, the Reverend E. Roy Burchell of the

West Center Church in nearby Bronxville acknowledged the "risk" that the project might cause "the complexion of [the] community to change somewhat" by bringing in outsiders, but nonetheless urged support for the project. GX 1118.23. A copy of his letter was sent to the Planning Board. *Id.* On May 14, the Planning Board voted four to one to approve the site. GX 1118.26.

On June 12, the City Council approved the site as well (together with the Willow Street site), but not without a long and heated public hearing. GX 1118.32; 1118.34. Speaking in favor of the site, Emmett Burke of the MHA called upon the City Council to break down "the invisible wall between east and west Yonkers," and argued that HUD wanted senior citizen housing to be built throughout the City and would no longer agree to building only in West Yonkers. GX 1118.32. Numerous senior citizens spoke in favor the site as well. However, numerous East Yonkers homeowners, and ward councilman John Hanney, spoke against the site, arguing that there had been an absence of community imput in selecting the site and that other sites were available. Burke replied that other sites, including some suggested by Hanney, had in fact been considered, but that Hanney had "played games" with sites, "withdrawing them as fast as [he] suggested them." *Id.* Several hours after the session had opened, the Council voted nine to three, with one abstention, to approve the site. All three opposing votes, as well as the abstention, came from east side councilmembers. *Id.*

Within a week of the Council's vote, however, the owners of the Palmer Road site filed suit to challenge the legality of the Planning Board approval, contending that insufficient public notice had been given. Upon the advice of the City's lawyers, the Planning Board scheduled another hearing. GX 1118.35; 1118.39.

On the day of the hearing, some seventy East Yonkers residents appeared to speak against the Palmer Road site. The residents contended that the site was unsuitable for senior citizens because of its distance from shopping and other facilities; because

of the limited availability of public transportation; and because the neighborhood was noisy and unsafe. GX 1118.39; 1118.41.

Past and present MHA Board members in attendance at the meeting made clear they considered the objections pretextual. One noted that "no one ever asked about transportation for the senior citizens as long as we were building in a neighborhood that they didn't live in," and suggested that there was an "unspoken concern" that minorities would move into the project. *Id.* Another said the "heart of [the] opposition" is simply that the residents don't want public housing in their neighborhood. *Id.* Another characterized the objections as the sort of "lame excuses" always raised to subsidized housing. *Id.* One opponent explained in reply that they were "not uncompassionate people" or "aristocratic snobs," but were "just suggesting that there were alternative sites in the area that should be considered." *Id.* The Planning Board deferred action on both the Palmer Road and Willow Street sites — the latter at the request of MHA Chairman Emmett Burke, who contended that HUD was not likely to approve Willow Street unless Palmer Road was offered as well. *Id.*

A second Planning Board hearing was held the following week, at which time the Board voted to approve the Palmer Road site. A City Council hearing and re-approval followed several days later. GX 1118.42-1118.44; 1118.48. These hearings, as well, were marked by long and heated debate about the Palmer Road site. *Id.* The issue of race, alluded to in previous hearings, arose again as Antonio Lombardi, Chairman of the Housing Committee of the Yonkers NAACP, urged the approval of Palmer Road and other sites in East Yonkers. GX 1118.42. Lombardi contended that scattered site housing was "long past due," and suggested that the past failures to approve scattered sites reflected "a concerted effort to create segregated neighborhoods" in Yonkers. *Id.* William Gibson expressed a similar view, recounting his experiences as a member of the UDC-CAC when efforts were being made to find scattered sites for UDC Projects. "Racism and

ignorance are still alive," Gibson declared, "sites have been offered and withdrawn . . . offered, then withdrawn, and we are still playing the same game." *Id.*

Meanwhile, area residents continued to offer various and even (as Emmett Burke observed) contradictory objections to the site. Palmer Road was declared unsuitable by some because of its location in a floodplain, and by others (including the owner of the site and ward councilman Hanney) because of its value as a "prime building site." GX 1118.43; 1118.48. Nor did the opposition end with the Council's reapproval of the site. The owner subsequently attempted to obtain building permits for a 50-unit private development, GX 1118.50, and the Longvale Homeowners Association as well as a number of individual residents maintained a steady correspondence with HUD, protesting various aspects of the approval process and challenging the merits of the site itself. *See generally* GX 1118.

Others, however, wrote to HUD in support of the proposal, contending that the concentration of subsidized housing in Southwest Yonkers represented "racial and economic segregation . . . practiced . . . by the city with the aid of the federal government." GX 1118.83; 1118.85; 1118.89; 1118.99. The City Manager likewise wrote to HUD in support of the project, asking that it receive the "highest priority" for processing. GX 1118.71.

In one letter, Emmett Burke explained that "fear of public housing" had provoked opposition to Palmer Road, as it had in the past with respect to many other East Yonkers sites, and he urged HUD to assist the City "in crushing the wall that keeps public housing out of the east section" of Yonkers. GX 1118.57. In another letter written several months later, urging HUD to approve a particular method of construction for Palmer Road, Burke reported that:

> The Justice Dept. has made a public issue of the concentration of public housing in the West section of our

> City. This action has made segregation an open and serious problem. This problem has existed for some years and is now a public issue. The minorities are keeping a close watch on developments on the Palmer site, and confer with us regularly.

GX 1118.115. As of the end of trial, the Palmer Road project was under construction.

The City places considerable emphasis on the approval of the Palmer Road site, contending that it proves that it was not impossible to obtain City Council approval of an East Yonkers site for subsidized housing, and that sites could be approved despite the opposition of the councilman for the ward in which the site was located.

However, the circumstances surrounding the approval of Palmer Road scarcely negate the existence of a pattern established over the course of thirty years of site selection. Nor, for several reasons, can the approval of Palmer Road be viewed either as a complete or a permanent departure from that pattern. First, in light of the proposal's status as senior citizen housing, and the evidence showing a continued pattern of discriminatory actions with respect to the Section 8 Existing Program, *see* HOUSING V.B *supra*, the approval of Palmer Road cannot be viewed as evidencing an abandonment of the pattern of racially influenced opposition to the placement of subsidized housing for families in East Yonkers. In addition, subsequent events make clear that the pattern was not, in fact, abandoned.

F. Actions Subsequent to the 1980 Contract Conditions

The activity of the Justice Department mentioned in Emmett Burke's letter of August, 1980 referred to indications that a lawsuit was being contemplated against the City of Yonkers, and to the Department's involvement in HUD's decision in June of 1980 to impose conditions upon the City's receipt of its Year VI

CDBG funds. The most significant of those conditions required the city "to take all actions within its control to provide for the construction of 100 newly created units" of subsidized housing for families "located outside of areas of minority concentration." GX 1140.1. The number of units represented the goal which was designated in the City's Year V HAP (the first such goal designated by the City) and which the City had made no progress toward implementing.

In the two years following the imposition of the 1980 contract conditions, the City Council failed to support a single site for subsidized housing for families. One site actively supported by the City's planners was strongly lobbied against by newly elected Mayor Gerald Loehr and opposed by the City Council. In addition, with respect to two other sites designated as likely sites for subsidized housing, actions having the effect of rendering the sites unavailable for subsidized housing were taken or attempted by the City Council. And at least with respect to one of the sites, that effect was clearly intended.

1. Salisbury Gardens

In May of 1980, a proposal was submitted to HUD for the development of Salisbury Gardens, a Section 8 new construction project on Salisbury Road and Sadore Lane in East Yonkers. GX 1132.4. As originally proposed, the project was to consist of eighty units for senior citizens and twenty units for families; the planned number of family units was increased to forty-two in July. GX 1132.8.

The site was in a census tract specifically designated for new construction in the City's current HAP, and properly zoned for the project. GX 1132.4; 1132.8; C-1090. In addition, since the site was owned by the proposed developer, and since the developer planned to perform some of the contracting work himself, no tax abatement was required in order to make the project financially feasible. TR. 1600 (Walsh). Moreover, as the developer's attor-

ney pointed out to City officials, the project could be offered in partial satisfaction of the newly imposed 1980 contract conditions. Tr. 1628-29 (Walsh).

The initial reaction from City officials was highly positive. The City Manager Eugene Fox advised HUD by letter in July that the City "endorse[d] and support[ed] the proposal, and urged "expeditious approval" of the project, noting that it was in conformity with the City's HAP; that the proposed developer had "excellent reputation"; and that the project could be developed " 'as of right' without any further City approvals." GX 1132.7.

Less than a week after Fox's letter was mailed, however, HUD's Housing Division received a telephone call from a "very upset" Edward Fagan, the councilman for the ward in which the site for Salisbury Gardens was located. GX 1132.12. Fagan told HUD that the project was "in the backyard of the local democratic leader" and "next to a large and well-organized apartment building," and he asked HUD to send him a copy of the proposal, saying that he felt he would have difficulty obtaining it through the City Manager's office. *Id.*

Over the next six weeks, growing opposition to the project was expressed by area residents and City officials, and communicated to HUD. The Northeast Homeowners/Tenants Association, for example, met with Councilman Fagan and sent a letter to HUD registering their "strong objection" to the project. P-I 268-16. Mayor Loehr wrote to HUD as well, contending that the project would "adversely impact[ ] the quality of life in this established residential area." GX 1132.23. Loehr also sent a mass mailing to area residents expressing his concern about the "unacceptable burden" the project would impose on the neighborhood. GX 1132.21; 1132.25; 1132.26. Loehr's letter included the name and address of the Area Manager of HUD and urged area residents to "express [their] concerns" to him about Salisbury Gardens. *Id.*

On September 2, the City Council held a public hearing on the project. The hearing, which was advertised by flyers urging residents to "Be there! . . . Show your concern . . . Stop them now!", was well-attended by area residents who spoke against the project. GX 1132.29; 1228. Various councilmembers spoke strongly against the project as well, frequently eliciting applause and cheers from the audience. GX 1228, at 45-80. Councilman Fagan, for example, declared that:

> The people in Sadore Lane don't want good works. They want results. They want to see this application turned down. They want to save their neighborhood. They don't want to flee again.

Id. at 75-76. East side councilmen Nicholas Longo and Michael Cipriani, both strong opponents of putting subsidized housing in East Yonkers, *see* HOUSING V.F.3 *infra*, similarly declared that the City Manager "better damn well find a way to tell HUD that we don't want this," *id.* at 70 (Longo), and urged the Mayor and every councilmember "to support and hear what the constituents of the tenth ward are saying." *Id.* at 72 (Cipriani). At the close of discussion, a resolution was unanimously adopted stating the City Council's opposition to the project, directing the City Manager to withdraw his letter of support, and directing the City Clerk to send a copy of the resolution to HUD. GX 1132.30.

HUD continued to process the project, but a virtual moritorium was placed on Section 8 funding soon after the proposal's submission, and despite extra efforts by some HUD officials to obtain funds for the project, P-I 268-30A, it was not funded.[56]

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[56]The City contends that the City Council's opposition to Salisbury Gardens cannot be attributed to the City since the City Manager is the officer authorized to speak for the City in section 213(a) reviews and since there is no evidence that he complied with the City Council's directive to withdraw the City's favorable section 213(a) review. In addition, the City contends that it cannot in any event be held liable for that opposition since the proposal was

(Footnote 56 continued on next page)

2. The Neustadter Site

A few months later, the City submitted to HUD, in partial compliance with the 1980 contract conditions, an inventory of fourteen sites that were outside of areas of minority concentration. GX 1140.9. All fourteen were east of the Saw Mill River Parkway. Most would have required a zoning change in order to be used for subsidized housing. Planning Director Pistone privately expressed the opinion that with the possible exception of a site on Trenchard Street (the School 4 site), there was virtually no chance that the necessary zoning changes would be approved. GX 1132.45; TR. 1642-44. (Walsh).

HUD reviewed the sites and notified the City in April of 1981 that only three sites "appeared to be free from substantial impediments to the feasible development of housing." GX 1140.23; *see also* GX 1140.16; 1140.18; 1140.29. The three sites were the School 4 site; the Neustadter site at McLean and Central Park Avenues; and 1919 Central Park Avenue. HUD asked the City to provide within thirty days a description of the steps necessary to make the sites available for subsidized housing. GX 1140.23. That same month, the City Council voted to approve the City's Year VII CDBG application, but only after the deletion of any expressions of intent to promote the placement of subsidized housing in East Yonkers. *See* GX 1229, at 85-128.

In May of 1981, the City replied to HUD's inquiry, saying that with respect to the Neustadter site, a petition was at present before the City Council to change the zoning to allow commercial use; that the School 4 site was at present still held by the Board of

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(Footnote 56 continued from previous page)

ultimately defeated by a lack of funding rather than the City Council's opposition to it. Both contentions are without merit.

The opposition expressed to the proposal was not expressed by an isolated City official, but by formal resolution of its governing legislative body. Nor was the City Council's action inconsequential, if only in its effect on the likelihood that future proposals would be made for east side sites when Section 8 or other federal funds again became available. *Cf.* HOUSING III.C.2 AND IV.C *supra*.

Education, and that "no schedule [had] been established" for its transfer to the City; and that on November 25, 1980 (three weeks after the list of sites had been sent to HUD), the City Council had rejected a petition to change the zoning of the third site, 1919 Central Park Avenue, to high density residential use, the result of which was that a new zoning petition could not be submitted for consideration except upon a three-quarters vote of the City Council. GX 1140.29.

Shortly after the City's May 1981 letter, the City Council approved the zone change permitting commercial use on the Neustadter site. GX 1140.43. The use of the site had been publicized as presenting a choice between a "shopping center or low-income housing," with ward councilman Cipriani publicly stating that his vote would be guided by his constituents. GX 1117.10. During the same public discussions, Mayor Loehr stated the federal government was pressing the City to develop subsidized housing in East Yonkers, that it could not at present "compel" the City to do so because of existing zoning patterns, but that in view of the litigation pending in court (a reference to the present action, which had been filed in December of 1980) he could not speak for the future. *Id.* Both Councilman Cipriani and Councilman Longo took credit in a subsequent election campaign for having blocked subsidized housing on the Neustadter site by voting for the Waldbaum's development. TR. 7801-13 (Longo); GX 1302.10. The following year, beginning in March of 1982, efforts were made to sell School 4 for private development as well.

3. School 4

School 4 was one of seven schools closed by the Board of Education in 1976. *See* SCHOOLS IV.A.3.b *infra*. The site was zoned "M" at the time of the school's closing, permitting multi-family residential development, and in an April 1976 memorandum regarding possible re-uses of the closed schools, Planning Director Philip Pistone recommended that the school be converted into apartments. GX 1187.2. However, the Board of Edu-

cation did not return the school to the City until 1982, and for the intervening six years the school remained vacant, with the cost of its annual upkeep estimated at $40,000 to $50,000. Tr. 7542-43 (Martinelli); *see also* SCHOOLS V.E.3 *infra*.

Between 1976 and 1979, several companies expressed interest in the school for commercial re-use. VSP Co., a video software manufacturer, offered $250,000 for the school in 1978, but was encouraged by Mayor Martinelli to purchase School 7 instead, which had been returned to the City soon after its closing in 1976. VSP Co. followed the Mayor's advice and purchased School 7 for $10,000, with the City agreeing to provide $100,000 worth of renovation. Tr. 7516-21, 12,342-43 (Martinelli). Martinelli, who had campaigned strongly against the closing of School 4, testified that he still harbored hopes at the time that the school would be reopened. Tr. 7517-18 (Martinelli).

Then, beginning in the summer of 1979, School 4 began to be discussed as a possible site for subsidized housing. A committee formed by Councilman Hanney to investigate alternative sites for the public housing scheduled for Palmer Road offered School 4 as one possibility, but the suggestion was rejected by Emmett Burke of the MHA on the ground that City Council members had expressed a "preference for private development" of the site. GX 1118.117. Soon thereafter, in September of 1979, Ward Councilman Cipriani and Twelfth Ward Councilman Longo, whose own ward ended a few yards away from School 4, petitioned for a change of zoning for the site from "M" (multi-family) to "T" (two-family houses) — a petition that was characterized by at least one Planning Board member as intended to "give the community some peace of mind." GX 1170.5. The Planning Board unanimously recommended against the change on the grounds that "multifamily residential" was the best classification for the site, and that any "downzoning" might diminish the potential sale price to the City. P-I 199-31. Nonetheless, the City Council unanimously approved the zoning change. P-I 199-35.

The effect of the change was to require any developer who sought to use the property for a purpose other than two-family homes to apply to the Zoning Board for a variance, or to the Planning Board and City Council for re-zoning. The change had no effect on commercial developers (who would have faced the same course with the original zoning in place), but it did have the effect of preventing an "as of right" development of a multi-family residential building.

In August of 1981, in response to an inquiry from HUD about the specific steps the City was taking to facilitate the development of subsidized housing, the City reported with respect to School 4 that the Board of Education was "somewhat hesitant about relinquishing property under its control while the current litigation is taking place," but that the City was "actively encouraging" the Board to do so "in an effort to allow future development of rental housing." GX 1140.43. In addition, the City reported that it had recently informed two minority developers of the nationwide set-aside of 1,500 subsidized housing units for minority contractors and "encouraged them to solicit some of these units [for] sites within the City of Yonkers." *Id.*

In a letter written two weeks earlier, however, to a minority contractor who had responded to the City's announcement, the CDA merely referred the developer to HUD for the necessary information about minority set-asides, and noted that the City had received "preapproval" of three out of fourteen sites submitted to HUD but that one was to be developed by Waldbaum's; another would require a three-quarters vote of the City Council before a zoning change could be considered; and the third was "still in the possession of the Yonkers Board of Education." GX 1140.41. No mention was made of the City's on-going "active encouragement" of the Board to release the site to make it available for subsidized housing.

Indeed, despite the City's representations to HUD that it was actively attempting to effect the expeditious transfer of the school,

see, e.g., GX 1140.43. Tr. 8577-80 (Miecuna), the only evidence of such efforts relate to the City's rapid response to a proposal to develop the site with luxury housing.

On March 16, 1982, a representative of a developer wrote to City Manager Sal Prezioso expressing interest in the site. GX 1170.9. Two days later, Prezioso forwarded the correspondence to Superintendent of Schools Joan Raymond, asking for a response at her "earliest convenience." GX 1170.10. Less than a week later, Raymond replied that the matter was before the Board's Facilities Committee and that she had "strongly recommended" that the Board of Education take action. GX 1170.11. In contrast to the minority contractor who was merely advised that School 4 was still under the control of the School Board, the proposed developer of luxury housing was sent a copy of Superintendent Raymond's letter and assured by the City Manager that "[a]s soon as matters are brought to fruition, we shall be in touch with you." GX 1170.14. Three months after the developer had written to City Manager Prezioso (and six years after the school had been closed), School 4 was returned to the City. P-I 199-52.

A few days later, the City Council passed a resolution creating citizen's committees to study and recommend to the City Council the appropriate re-use for Schools 4 and 15 (the latter also an east side school closed in 1976). P-I 199-53. At a community meeting attended by newly re-elected Mayor Martinelli, Ward Councilman Cipriani appointed the School 4 committee's five members. All five were white and all five lived in the overwhelmingly white neighborhood surrounding School 4. None except Walter Forrester, who was subsequently chosen by the group as chairman, had any prior experience with development or zoning issues. Tr. 7928-29 (Cipriani).

The appointment of a citizen's committe to recommend a re-use for School 4 was, as Mayor Martinelli acknowledged at trial, unprecedented. Tr. 7546 (Martinelli). The procedure had not been used in the past for any of the other closed schools nor,

apparently, for any other City-owned property. The only roughly comparable instance in evidence was Mayor Martinelli's subsequent appointment, in the spring of 1983, of a citizen's committee to recommend whether a site in Southwest Yonkers should be sold to the Hudson River Association for use as a community center (with the investment of approximately $650,000 of the City's CDBG funds). There, however, Martinelli deliberately chose committee members who did not live in the immediate area so that the proposal would be evaluated objectively, and four out of five of the committee members chosen lived in East Yonkers. Tr. 7550-52; 12,352-55 (Martinelli). With respect to the School 4 committee, Mayor Martinelli stated simply that Ward Councilman Cipriani had requested that the committee consist of area residents, and that he had acceded to that request. Tr. 7551-52.[57]

The committee was given no criteria by which to evaluate proposals, nor was it advised to contact Planning Director Pistone or any other City official involved with planning or development. Nor did it do so — despite the inexperience of its members in matters relating to planning and development. Tr. 7555 (Martinelli); 8057 (Forrester). (Nor, in another departure from standard procedure, did the City Council solicit the Planning Board's views before voting on the committee's eventual recommendation. Tr. 9810 (Pistone).)

The Committee was not given a list of developers or any assistance in obtaining such a list. Instead, it was told that the City would publicize the committee's existence and arrange for developers to contact it. Tr. 7554 (Martinelli); 8056-57 (For-

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[57]At trial, Councilman Cipriani maintained that the role of the committee was merely advisory, and that he had never suggested that the Council would necessarily adhere to the community's wishes. However, his prior statements under oath decidedly suggest otherwise. At his deposition in preparation for trial, Cipriani testified that the committee was chosen so that the decision wouldn't be in the hands of the Council, and that choosing only area residents was seen as "a neighborhood idea — like children going to school where they live." Tr. 7961-65.

rester). A press release was issued announcing the existence of the committee, but no other efforts appear to have been made to find potential developers. P-I 199-53; Tr. 7931 (Cipriani).

Shortly after the committee was formed, two developers called to express interest in School 4. One was Melvin Weintraub from Morelite Construction, who proposed to convert the building into condominiums and construct townhouses on the school playground across the street. The other was Leon Lauterbach, who on behalf of his client Dominic Yanni, was the one who originally contacted the City Manager about the site, and who proposed to convert the school into rental units. Tr. 8052-53 (Forrester).

Some two weeks after the committee's formation, a meeting with held with Melvin Weintraub. Weintraub presented a set of renderings of the proposed project, based on blueprints of the school which he had obtained from the City, and indicated that the starting sales price for the condominiums would be $100,000 to $125,000. Tr. 8058-61 (Forrester). According to Forrester, the general reaction of the committee was that "for that kind of price, people would come in that we would like to live in the neighborhood." Tr. 8065. The committee did not discuss a selling price for the school with Weintraub. Forrester testified that the sales price was not the committee's job, that its sole function was to recommend the "best use of the property," and that the sole criterion for determining best use was "the use that would best fit the neighbors." Tr. 8062,8071.

Another developer, Luciano Martirano, also appeared at the meeting with Weintraub, saying that he had heard about the committee and was interested in developing the property with two-family homes. An appointment was made for Martirano to come back and present a proposal, but according to Forrester, he never reappeared and never submitted a proposal. Tr. 8067-69.

Several weeks later, the committee held its second and only other meeting with a prospective developer, at which Leon Lauterbach's client, Dominic Yanni, proposed conversion of School 4 into apartments to rent at approximately $175 per room. Although the City had initially been responsive to Yanni's expression of interest in the site, he had subsequently been unable to obtain blueprints of the school from the City. As a result, his proposal was limited to an oral presentation, without accompanying sketches. Tr. 8069-70 (Forrester).

After Yanni left, the committee discussed the proposals that had been presented. According to Forrester, everyone was in favor of Weintraub's proposal for condominiums, and as a result, Forrester called Yanni the next day and told him he need not go the expense of preparing sketches of his proposal. Forrester also called Ward Councilman Cipriani and reported that the committee had selected a proposal for condominiums. Forrester explained that the committee felt that apartment dwellers might be "transient," whereas condominium owners would have a vested interest in the property and therefore care for it properly. Tr. 8071-74 (Forrester). At trial, Forrester acknowledged that he knew Yanni owned an apartment building next to School 4, and that he had had no particular experience with those apartments that led him to believe that apartments represented a threat to the stability of the neighborhood. Tr. 8076-78.

Later that month, on August 12, a meeting was held for area residents at which the committee gave its recommendation for the re-use of School 4. C-1381. The recommendation was unanimously approved, and the committee was instructed by Ward Councilman Cipriani to file a report with the City Council. Tr. 8075-77 (Forrester).

The committee filed its report, and on September 14, 1982, the City Council passed a resolution authorizing the City Manager to obtain two appraisals of the property. C-1373. On the basis of those appraisals, the City set a minimum sale price of

$230,000. C-1376. The City also wrote to HUD in October reporting that it had received "firm commitments of interest" from a developer to build "moderate income condominiums" on the School 4 site and asking for leave to remove the site from the inventory of possible sites for subsidized housing that had been submitted by the "prior administration." C-1374. HUD granted the request, and Councilmen Longo and Cipriani co-sponsored a local law that would permit the sale of School 4, without public bidding, to Morelite Construction (Weintraub's company) for $230,000. A public hearing on the sale was scheduled for December 21, 1982. C-1375; GX 1170.28.

A week before the hearing, Councilmen Longo and Cipriani sent a letter to their constitutents reporting that "a problem ha[d] developed" with respect to the proposed sale of School 4. GX 1170.28; Tr. 7784-87 (Longo); 7970-71 (Cipriani). The letter explained that:

> in 1980, then City Manager Gene Fox and former Mayor Gerald Loehr recommended the School #4 as a site for subsidized housing..... As a result of the Loehr-Fox action, the NAACP has threatened to stop the city from selling the property for any use other than low-income housing.

GX 1170.28. The letter then went on to urge residents to attend the upcoming City Council hearing, claiming that:

> At this point, the Council is almost equally divided between the condominium proposal and the wishes of the NAACP. Your attendance and your opinion will be extremely helpful at the Public Hearing scheduled for 8:00 P.M.

Id.

The public hearing held on December 21, was so well-attended that a television monitor was set up to enable the overflow from the Council chamber to watch the proceedings from an adjoining room. The audience was heavily white, and the discussion itself, a videotape of which has been received in

evidence, was emotionally charged, with expressions of concern about the effect that subsidized housing would have on the "character" of the neighborhood, and frequent exhortations by councilmembers to heed the "will of the community." GX 1226; *see also* Oxman Dep. 123-29; Cola Dep. 169-71.

A number of residents, most of whom were black, opposed the sale. Those speakers described the racial segregation that existed in Yonkers, and the events leading up to the submission of the list of sites to HUD. The final speaker, who was white, spoke of how blacks had ruined neighborhoods in the Bronx, claiming that the buildings originally were "in fine shape" but had "deteriorated" when the blacks moved in. The speaker then stated that he supported the condominium proposal because he didn't want the same thing to happen in Yonkers, and closed by saying, "I'm not a good speaker . . . but I think you get the idea." The audience responded with an ovation.

During the Council discussion that followed, Ward Councilman Cipriani urged the Council to support the proposal for condomiums, saying that it was a concept that his constituents had adopted, and that he would "follow it as long as [he was] an elected councilman." Cipriani contended that the issue was not one of black versus white, but then went on to claim that he had earlier supported the concept of subsidized housing for the site as long as it was limited to housing senior citizens.[58]

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[58]Councilmember Cipriani apparently was referring to a meeting he had sometime between late 1980 and early 1981 with Maxwell Speiser, a developer who had expressed an interest in converting School 4 into subsidized housing, and who had been brought to Ward Councilman Cipriani by Emmett Burke of the MHA. Tr. 7919-21, 7953-57 (Cipriani); Speiser Dep. 72-79. Cirpriani testified at trial that the proposal was for senior citizen housing, that he had responded favorably, and that he had held a meeting with area residents on the subject. Tr. 7919-21, 7953-57. Maxwell Speiser testified, however, that his expression of interest hadn't been limited to senior citizen housing, and that Cipriani had merely told him the site was unavailable since it was still being held by the Board of Education. Speiser Dep. 72-79.

One Councilmember, Katherine Carksy, raised several concerns about the procedure by which the school was being sold. Carsky objected to being asked to approve the sale without having been shown the developer's proposal, and she reminded the Council that it had not long ago passed a resolution requiring public bidding for the sale of City property. In addition, she questioned Longo and Cipriani's estimate that $600,000 in annual tax revenue would be derived from the condominiums (an estimate which Longo and Cipriani acknowledged at trial to have been inflated by a factor of ten, Tr. 7973 (Cipriani); 7788-89 (Longo)), and she noted that the current zoning of the site was inconsistent with the proposed use. Carsky suggested that if the site were first rezoned and then bid on, a higher sales price would be realized by the City.

Councilmember Cipriani replied that:

> It's not a question of dollars . . . It's a question of concept, as to what the neighborhood would like to see, just like . . . . the concept of what your neighborhood near Palmer Road would like to see.

Cipriani's statement was greeted with applause and cheers, following which, he added "we will change that zone when the concept fits the people, not before."

Councilmember Longo stated that the decision to forgo public bidding was a matter of "trust" in the developer, explaining that another developer might get the required zoning change and then change the use of the site. Longo objected to frustrating the will of the community by denying it a developer it trusted and also stated that "many of us are concerned" about not delaying the project.

Four other councilmembers, including Mayor Martinelli, likewise deferred to the "will of the community." Mayor Martinelli said that he supported the condomiuium proposal on the ground that people ought to "have a right . . . to decide what

happens to" their neighborhood. Councilmembers MacDonald and Jacono agreed that it was important for communities to be permitted to decide how sites would be used, and Councilmember Spreckman stated that she was there "as a representative of the people, to see that the people get what they want." Spreckman indicated that she supported public bidding as a general rule, but not where the community had clearly made its wishes known.

The only councilmember other than Carsky to oppose the sale was Harry Oxman, who stated that he would be against the sale until it was known what "problems" the City would have as a result of the pending litigation. Oxman also observed that the concentration of so much subsidized housing in the Southwest had "almost annihilated" Getty Square.

At the close of the meeting, the City Council voted eleven to two to sell the site. In response to the City Council's vote, Plaintiff-intervenors applied to this Court for a preliminary injunction forbidding the sale of School 4. The City subsequently consented to the hold the sale in abeyance pending resolution of this litigation.

The City has argued that since it was under no duty to retain School 4 for possible use as a subsidized housing site, it cannot be held liable for attempting to sell it. It is well settled, however, that actions which are otherwise lawful lose that character when they are undertaken for a discriminatory purpose. *See, e.g., United States* v. *City of Parma, supra*, 494 F.Supp. at 1099. And in light of the historical background and sequence of events leading up to the attempted sale; the procedural irregularities and disregard of standard considerations which attended it; and the nature of the debate preceding the Council's vote, it is difficult to imagine a clearer case of an action taken for a discriminatory purpose.

The prime movers of the zone change and attempted sale of School 4 were councilmembers who made no secret of their opposition to the placement of subsidized housing (at least for

families) in East Yonkers. Indeed, their own campaign literature has described them as "leading the fight" against it. GX 1301.9; 1302.10. And the record makes clear that School 4 came to be viewed as a primary battleground in that fight. The attempted sale was not a routine and race-neutral disposition of surplus property, but an effort to ensure that the site could not be used for the construction of subsidized housing in East Yonkers. As such, it reflects a clear intent on the part of City officials to continue the thirty-year pattern of discriminatory actions that has operated to exclude subsidized housing for families from East and Northwest Yonkers.[59]

VI. THE EFFECT OF THE CITY'S ACTIONS ON THE RACIAL CONFIGURATION OF YONKERS

The City contends that regardless of whether its actions with respect to subsidized housing are found to have been motivated by segregative intent, it cannot be held liable for those actions since they did not significantly contribute to the extreme condition of segregation that exists in Yonkers today. The City's contention is without merit.

While the record contains apparently conflicting evidence on the question of whether the City's actions significantly exacer-

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[59]The presence of several categories of evidence remaining in the record but not reviewed above should be noted. The plaintiffs have offered a considerable quantity of evidence relating to the City's alleged nonsupport of fair housing laws and principles. In addition, both the City and the plaintiffs have offered evidence on the City's alleged compliance or non-compliance with the 1980 contract conditions and subsequent "contract comments". Finally, the City has argued that it has cooperated in the Consent Decree approved by this Court between HUD and Plaintiff-intervenor and that its cooperation is an indication of its good faith and nondiscriminatory intent.

We have found nothing in that evidence which is inconsistent with the pattern of discriminatory actions reviewed above. Nor, in light of the evidentiary strength of that pattern, do we consider it necessary to review evidence that further reinforces it.

bated the level of minority concentration in Southwest Yonkers (the point on which the City's argument focuses), there can be no doubt that the City's actions have played a significant role in the preservation of East and Northwest Yonkers as overwhelmingly white communities.[60] Indeed, it is difficult to imagine a pattern of actions by City officials that could have done significantly more in this regard. Not one of the City's twenty-seven subsidized housing projects for families is located in any of the overwhelmingly white neighborhoods of East and Northwest Yonkers. Twenty-six are located in (or, in the case of Seven Pines, literally on the border of) Southwest Yonkers; the twenty-seventh is in Runyon Heights, a minority enclave in East Yonkers. Section 23 leased housing has likewise been largely confined to buildings located in the Southwest, and the Section 8 Existing program (which is subject to no formal geographic control by the City) was for several years limited to senior citizens, and even after its expansion to include families, appears to have been actively promoted only to Southwest Yonkers landlords.

Moreover, this is not a case in which City officials simply neglected to consider sites outside Southwest Yonkers for family housing. Instead, it is a case in which sites were repeatedly considered and then rejected after the residents of those overwhelmingly white communities made their strong objections known. It is also a case in which it was generally acknowledged, at least as early as 1966, that what was at issue in their site selections was whether the Yonkers community was "ready" to accept racial integration. *See* HOUSING III.D *supra*. As a result, it is clear that the City's actions not merely preserved but strengthened existing patterns of segregation by appearing to

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[60]Nor has the City attempted to argue this point. Instead, it has merely suggested that circumstances beyond its control (such as the unsuitability of sites or the unavailability of funds) prevented the construction of projects in East and Northwest Yonkers. That suggestion, as our foregoing review of the evidence has made clear, is entirely at variance with the record.

condone, or at least respect, the segregative sentiment that prevailed in East and Northwest Yonkers. If City officials themselves appear unable or unwilling to breach a racial barrier, it becomes all the more unlikely that individual minorities will be encouraged to try, or that individual whites will be encouraged to abandon the attitudes that have erected that barrier.[61] *Cf., e.g., Reitman* v. *Mulkey,* 387 U.S. 369 (1967); *Shelley* v. *Kraemer,* 334 U.S. 1 (1947).

Thus, at least with respect to the issue of the City's *liability* for its actions, the precise effect of the actions on the Southwest is largely beside the point. In light of the clear effect of those actions on the racial composition of East and Northwest Yonkers, no more is required to confirm that the actions did indeed contribute significantly to the extreme condition of segregation that exists in Yonkers today. A plaintiff need not prove, with mathematical exactness, the precise effect of discriminatory actions in order to establish the defendants' liability for those actions. *See, e.g., Armstrong* v. *O'Connell,* 463 F.Supp. 1295, 1309-10 (E.D.Wis. 1979).

Nonetheless, it bears noting (if only to guide future consideration of appropriate remedial measures) that the evidence belies the City's contention that its actions did not significantly exacerbate the concentration of minorities in the Southwest.

The period between 1960 and 1980 was marked by striking demographic shifts in the City as a whole, and in the Southwest in particular. During those years, and particularly beginning in the mid to late 1960's, the citywide minority population increased by 325%, and 94% of that increase was concentrated in Southwest Yonkers and census tract 7 (a tract on the northern border of the

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[61]There is also evidence that the effect of the City's actions in this regard was exacerbated by its decidedly less than vigorous support of fair housing laws. *See, e.g.,* Tr. 1950-95 (Trommer); 8093-8105, 8112-13 (Nargi); 10,580-83 (Yost); GX 1182.

Southwest, which contains the Seven Pines housing project). GX 1225.1; 1225.4; 1225.6.[62] During those same years, Southwest Yonkers also lost nearly half of its white population, resulting in a total rise in the level of minority concentration from 6.7% to 40.4%. GX 1225.1. The population of East and Northwest Yonkers, in contrast, remained overwhelmingly white. *See* HOUSING I *supra* (discussing the level of minority concentration in the various census tracts of East and Northwest Yonkers).[63]

Plaintiffs contend that this markedly increased concentration of minorities in the Southwest is, in significant part, the result of the City's placement of more than 5,000 units of subsidized housing there (compared to less than 200 units elsewhere, none of which was family housing in a white area of the City). Specifically, plaintiffs contend that the City's actions with respect to subsidized housing "stigmatized" the Southwest as a minority area, thus making it more likely that minorities would seek housing there, and more likely that whites would leave. The City, in turn, contends that the population shifts that have occurred in the Southwest are primarily attributable to the large stock of substandard (and therefore low-cost) housing there and the general trend toward suburbanization among upwardly mobile whites, with subsidized housing having no significant incremental effect.[64]

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[62]The percentage represented by the Southwest alone is 86%. GX 1225.1.

[63]Plaintiffs have suggested that the small increase in minority population shown for East and Northwest Yonkers between 1960 and 1980 (from 2.8% to 5.8%) may in fact be smaller still due to the inclusion in intervening years of "white hispanics" in the figures for minorities. *See* fn. 6 *supra*. The City, in turn, has suggested that this occurrence may also mean that the massive decline in the white population in Southwest Yonkers during those same years was slightly less massive. However, neither party has offered evidence to show that the adjusted figures (if they could be reconstructed) would likely be significantly different.

[64]The City also cites factors such as the failure of White Plains to provide adequate relocation housing for those displaced by urban renewal and the more liberal social service and welfare policies followed by Westchester County as

(Footnote 64 continued on next page)

The weight of expert testimony on this point strongly favors the plaintiffs. Paul Davidoff, an expert witness in housing, who testified on behalf of the United States, and Diana Pearce, an expert witness on housing and school segregation, each testified persuasively, on the basis of their general experience and studies in their respective fields, that the City's concentration of subsidized housing in the Southwest was indeed likely to have stigmatized it as a minority area. Tr. 180-81, 258-59 (Davidoff); 8178-95 (Pearce). In further support of her view, Dr. Pearce presented a series of "microneighborhood" maps which strikingly illustrate the general increase in minority concentration that tended to follow construction of the City's subsidized housing projects. P-I 352.[65]

In addition, and perhaps most significantly, plaintiffs' position even finds support in the testimony of the City's own expert witness on urban planning. Dr. Portman initially professed disagreement with plaintiffs' experts, but offered an explanation that suggested agreement more than disagreement (namely, that total abandonment of the Southwest might have had an even greater stigmatizing effect), and then conceded, when pressed, that there was "some logic" to the view expressed by plaintiffs' experts. Tr. 10,728-35 (Portman).

We agree that particularly when account is taken of the effect of the City's actions on the racial composition of East and

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(Footnote 64 continued from previous page)

compared with New York City. But these factors merely explain why more minorities may have moved to Yonkers generally, not why they moved to the Southwest in particular. The City has also cited, without elaboration, testimony offered in passing to the effect that a higher birth rate prevails among minorities. Such a factor may indeed have contributed to the rise in the Southwest's rise in minority concentration but in no respect suggests that subsidized housing development did not likewise do so.

[65]The City has criticized Dr. Pearce's analysis as inconclusive on the ground that any number of other factors might have accounted for that pattern. But such a criticism is unpersuasive unless accompanied by some reason to believe that the apparent pattern is, in fact, a false one. The City has suggested no such reason, nor do we perceive any.

Northwest Yonkers, there is considerable logic to the view expressed by plaintiffs' experts. When, as here, the City's actions with respect to subsidized housing have been found to have significantly contributed to the average minority member's inability (for reasons of race as well as economics) to find housing outside of Southwest Yonkers, it begs reason to suggest that those actions played no significant part in the circumstances that caused 94% of a large citywide increase in minorities to be concentrated in and around the Southwest.

Nor is it likely that those actions played no significant part in the Southwest's simultaneous loss of nearly half its white population. GX 1225.1. Common sense suggests, and the record as a whole confirms, that if obvious actions are being taken to preserve the overwhelmingly white character of all areas of a city except one, the incentive for whites to remain in that area will be significantly diminished. Indeed, decisive support for plaintiffs' theory of stigmatization is found in the concerns repeatedly expressed or alluded to in Yonkers by minority and church leaders seeking to stop further concentration of subsidized housing in the Southwest; by white residents of East Yonkers seeking to prevent the construction of subsidized housing there; and by some City officials themselves, who sought to blunt the stigmatizing effect by trying, in large part unsuccessfully, to attract more whites to the Southwest's projects. *See, e.g.*, HOUSING III.D, IV.B, IV.D.3, IV.D.4, and IV.D.5 *supra*.[66]

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[66]The City has suggested that its demonstrated difficulty in attracting whites to various of the Southwest projects is attributable to the "narrow band" effect of the upper and lower income units of § 236 projects and thus provides no evidence that the concentration of subsidized housing in the Southwest stigmatized it as a minority area. However, while there is evidence to suggest that the "narrow band" effect did decrease the pool of eligible white applicants, it is clear from the record that it was not the only source of the City's difficulties. *See, e.g.*, Tr. 10,158-59 (Bogdanoff) (describing the "continuing hesitancy" of whites in Yonkers to move into subsidized housing).

The only significant evidence offered by the City in rebuttal is a statistical analysis of the City's census tract data undertaken by Eric Hanushek, who testified as an expert witness in urban economics. Broadly summarized, Dr. Hanushek testified that at least when certain other likely contributing factors are also taken into account (namely, the large stock of nonsubsidized low-cost housing in the Southwest; the general minority presence there; and the trend toward suburbanization among upwardly mobile whites), it does not appear probable that subsidized housing development in Yonkers played any significant incremental role in the sharp increase in minority concentration that has occurred in the Southwest. *See* Tr. 9053-113.

However, there are many reasons to question the probative value and, indeed, the relevance of Dr. Hanushek's analysis, particularly when it is weighed against the evidence supporting plaintiffs' contrary contention. First, as Dr. Hanushek himself acknowledged, his conclusion was based solely on statistical probabilities derived from the City's census tract data, not from any study of the history of subsidized housing in Yonkers. Moreover, the factors analyzed by Dr. Hanushek were conceded to be overlapping and mutually reinforcing, thus complicating considerably the statistical analysis by which the probable individual contribution of each factor is derived. Tr. 9071, 9160-62. Although Dr. Hanushek nonetheless expressed confidence in the capacity of his statistical methods to derive meaningful probabilities, the mechanics of those methods did not prove sufficiently capable of articulation to allow the Court to share that confidence.

Finally, and by far most significantly, Dr. Hanushek conceded that various circumstances which could not be taken into account in his study might significantly affect the reliability of his calculations. Tr. 9133-39. And among those circumstances is the very one cited by plaintiffs as the primary basis for their conten-

tion that subsidized housing indeed contributed to the sharp rise in minority concentration in the Southwest.

The point can best be illustrated in a somewhat simplified form. Dr. Hanushek's analysis reflects, at least in significant part, a judgment that the amount of subsidized housing in the Southwest was, in comparison to the amount of other low-cost housing there, sufficiently low so as to suggest that its presence probably had no significant incremental effect on minority concentration. However, if the subsidized housing carries with it the stigma of having been adjudged to be minority housing, and therefore unsuitable for other areas of the city, the placement of that housing in the Southwest may have had a far greater influence on the resulting level of minority concentration than would otherwise be suggested by the ratio of subsidized to nonsubsidized low-cost housing in the area. Since Dr. Hanushek's analysis cannot detect, much less measure that added influence, it must assume its absence. As a result, the analysis fails to address, much less rebut, the evidence tending to show that subsidized housing *did* exert a stigmatizing influence. Instead, it merely suggests that if no particular stigma was attached to subsidized housing, it probably had no significant incremental effect on the concentration of minorities. As a result, even if the calculation of probabilities is reliable, the underlying assumption renders the analysis irrelevant to our inquiry.

One final aspect of the evidence presented during Dr. Hanushek's testimony is so misleading as to require separate, although brief, discussion. Using the figures derived from his analysis, Dr. Hanushek projected the probable racial composition of a hypothetical Yonkers in which no subsidized housing whatever had been built. That projection estimated the probable difference to be limited to a decrease of some 78 to 98 individuals among the entire Southwest population. C-1704.

For the various reasons described above (chief among them the assumption that subsidized housing carried with it no particu-

lar racial stigma), the projection is, in any event, wholly unreliable. But it is rendered especially misleading by an additional assumption, for which Dr. Hanushek offered no justification and which is totally unrealistic and unfounded — namely, that if no subsidized housing had been built in Yonkers, the same amount of housing would have remained available in the private market.

The City has since suggested that the assumption is a reasonable one since there is evidence tending to show that private-market units were removed at roughly the same rate at which subsidized housing units were built. *See* Tr. 10,730 (Portman) (discussing the figures for the 1970's). But even assuming that the City's construction of subsidized housing did not result in any significant increase in the overall density of the Southwest, it by no means follows that if no subsidized housing had been built, the density of the Southwest is likely to have remained constant. To the contrary, the record makes clear that much of the housing stock in the Southwest was rapidly deteriorating, thus leading to a steady loss of density unless the units were repaired or replaced. In addition, the record makes equally clear that the private market was unlikely to undertake that task on any significant scale. Indeed, as the City itself has emphasized in another context, it was precisely the *absence* of private-market interest in the Southwest which made some form of federally funded urban renewal there essential, and which in turn made the construction of subsidized housing somewhere in Yonkers equally essential. Thus, the "hypothetical" Yonkers described by Dr. Hanushek is, on the basis of the record before us, so unrealistic that any conclusions that may be drawn about it are simply irrelevant to this case.

In addition, it bears emphasis that the City could, in any event, have hoped to gain little by comparing the effect of its actions with that of what its own expert witness in urban planning described as the "worst case" alternative — failing to construct any subsidized housing anywhere in the city, and thereby failing

to obtain urban funds, and thus consigning Southwest Yonkers to continued and increasingly serious deterioration. Tr. 10,737 (Portman). Obviously, the only relevant comparisons to be made are with the effects of the alternatives reasonably available to the City and under circumstances reasonably likely to occur. Dr. Hanushek's analysis made no attempt at such comparisons. Indeed, he acknowledged that the limitations of the analytical methods available to him did not permit such comparisons to be made. Tr. 9214-15.

A passing attempt to compare the effect of reasonable alternatives was made in a question put to Dr. Portman about the probable effect that constructing 200 units of family housing in East Yonkers would have had on the level of minority concentration in Southwest Yonkers. But Dr. Portman's response — that, in his opinion, it would have had no significant effect — was also made in passing and is surely overbroad. Tr. 10,738 (Portman). It seems clear that the likely effect would depend on such variables as when the housing was built, what else was put in its place in the Southwest, and what other actions were being taken to promote fair housing in East and Northwest Yonkers. Moreover, even if Dr. Portman's opinion is credited, the construction of only 200 units elsewhere was not the only alternative open to the City. Finally, as suggested at the outset of this discussion, however uncertain the effect of the alternative may have been with respect to Southwest Yonkers, its likely effect with respect to East and Northwest Yonkers is clear. As Dr. Portman himself appeared to acknowledge, even the construction of so small an amount as 200 units of family housing in East Yonkers would have been likely to have exerted a significant integrative influence on the area. Tr. 10,786-88 (Portman).

A recurrent theme in the City's arguments to the Court has been that it is under no affirmative duty to promote integration through the construction of subsidized housing. But the absence, in the abstract, of such an affirmative duty does not equal a

license to discriminate in decisions relating to subsidized housing. It does not, for example, equal a license to refuse to build subsidized housing, despite a need for it, on the ground that it might result in racial integration. *See, e.g., United States* v. *City of Parma, supra.* Nor does it equal a license to make the *preservation* of existing patterns of segregation a factor in site selection. *See, e.g., Gautreaux* v. *Chicago Housing Authority, supra.*

Nor, it should be emphasized, is this a case in which the claim of segregative intent must rest merely on a failure to take, despite the opportunity and reason to do so, a *sufficient* number of actions having an integrative effect. Instead, it rests on a thirty-year practice of consistently rejecting the integrative alternative in favor of the segregative — a practice that had the unsurprising effect of perfectly preserving, and significantly exacerbating, existing patterns of racial segregation in Yonkers.

VII. CONCLUSIONS OF LAW

It is commonplace among courts and commentators that the task of determining whether actions were taken with discriminatory intent is a difficult one. Intent has been characterized as an "elusive, subjective concept," *Hawkins* v. *Town of Shaw,* 461 F.2d 1171, 1172 (5th Cir. 1972) (en banc) (per curiam), and particularly difficult to identify when the intent at issue is the "collective" intent of a legislative or administrative body. *See, e.g., Palmer* v. *Thompson,* 403 U.S. 217, 224-25 (1971); *Hart* v. *Community School Board of Education, New York School District #21,* 512 F.2d 37, 50 (2d Cir. 1975). The task of determining intent is further complicated by the likelihood that there may be little or no direct evidence of discriminatory intent, especially with respect to actions taken during the past few decades, due to the growing unacceptability of overtly bigoted behavior, and a growing awareness of the possible legal consequences of such behavior. *Cf. Smith* v. *Town of Clarkton,* 682 F.2d 1055, 1064-65

(4th Cir. 1982); *Arlington Heights II, supra,* 558 F.2d at 1290; *United States* v. *City of Parma, supra,* 494 F.Supp. at 1054.

In some respects, the case at hand might seem to present an unusually difficult exercise in determining intent. What is at issue is not a single action, or series of actions, undertaken by a single group of individuals, but more than thirty years of subsidized housing activity, for which a sizable and changing group of City officials shared responsibility. We are aware of only two prior cases that are of even roughly comparable scope, *see United States* v. *City of Parma, supra; Gautreaux* v. *City Housing Authority, supra,* and in neither case were the challenged actions defended with the vigor and sophistication with which the City of Yonkers has defended its actions here.

For several reasons, however, our conclusion that plaintiffs have sustained their burden of proving a pattern and practice of discrimination is a relatively easy one. First, as suggested at the outset of this Opinion, when the segregative effect of an action is extreme, or when there is a series of actions having a consistently segregative effect, the inference is stronger that the effect of the actions was intended. *E.g., Arlington Heights I, supra,* 429 U.S. at 266; *Washington* v. *Davis,* 426 U.S. 229, 241-42 (1976); *Yick Wo* v. *Hopkins,* 118 U.S. 356 (1886). Here, the segregative effect of the actions challenged by plaintiffs has been remarkably consistent and extreme. It is, to say the least, highly unlikely that a pattern of subsidized housing which so perfectly preserved the overwhelmingly white character of East and Northwest Yonkers came about for reasons unrelated to race. *See Gautreaux* v. *Chicago Housing Authority, supra,* 296 F.Supp. at 910; *United States* v. *City of Parma, supra,* 494 F.Supp. at 1097.

In addition, despite the considerable span of time involved, and the various changes in City personnel and in the structure of the subsidized housing programs themselves, there have been several constants in the development of subsidized housing in Yonkers which strongly suggest that these segregative effects

were not adventitious. One constant has been the emergence of strong community opposition following the proposal, or even the preliminary discussion, of sites for subsidized housing for families when those sites are in the heavily white areas of Yonkers — in particular, East Yonkers.

Another constant has been a political structure likely to make community opposition unusually effective. Plaintiffs have established that the operation of the City's ward system provided strong incentive for individual councilmen to defer to the views of their constituents on subsidized housing, and for the Council as a whole to defer to the views of the ward councilman. *Cf. Gautreaux* v. *Chicago Housing Authority, supra,* 296 F.Supp. at 913 (discussing the effect of Chicago's ward system). Plaintiffs have also established that this phenomenon was well known to the Planning Board, the CDA, the MHA, and others who worked with the City in the development of subsidized housing. *Cf. United States* v. *City of Parma, supra,* 494 F.Supp. at 1096 (discussing the effect of attitudes expressed by City leaders on subordinate local officials).

A third constant has been the extreme consistency with which the sites that have prompted opposition in East Yonkers and other heavily white areas have in fact been subsequently rejected, abandoned, or otherwise opposed by City officials.

These constants strongly suggest that whatever differences in personnel or programs there may have been throughout the years, subsidized housing in Yonkers has been characterized by a common theme: racially influenced opposition to subsidized housing in certain areas of the City, and acquiescence in that opposition by City officials.[67]

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[67]Although there are nominally two defendants in the housing portion of this case — the City of Yonkers and the CDA — they have mounted a collective defense, and their liability will be discussed collectively.

The City has cited cases in which courts have cautioned against determining the nature of community opposition, or its effect on City officials, largely on the basis of the "bigoted comments of a few citizens." *Arlington Heights II, supra,* 558 F.2d at 1292; *see also Angell* v. *Town of Manchester,* 3 E.O.H.C. ¶ 15,398 (D.Conn. 1981); *United States* v. *City of Birmingham, supra.* But this is clearly not such a case. A finding that there has been sustained racially influenced community opposition to the placement of subsidized housing in certain areas of Yonkers would not be based simply on the fact that in 1958, for example, a group of citizens sent City Council members a letter in opposition to subsidized housing which expressed concern about having "to absorb the overflow from Harlem and Puerto Rico," or that as late as 1982, a white resident of East Yonkers was met with loud applause from an overwhelmingly white audience when he spoke against subsidized housing at a City Council session, contending that blacks had ruined neighborhoods in the Bronx and that he did not want the same thing to happen in his neighborhood. Such statements form only a small part of the evidence which suggests that the community opposition in question was racially influenced.

As suggested above, among the most persuasive indications of racial influence here is the extreme consistency with which community opposition has arisen when the site proposed was in a heavily white area of the City — especially East Yonkers. Of all the many East Yonkers sites proposed or publicly discussed in the course of more than thirty years (with the exception of those in heavily black Runyon Heights), only one site appears to have prompted little or no community opposition — the site of Curran Court, a senior citizens project that has been virtually all white since opening. The uniformity of opposition to sites in overwhelm-

ingly white East Yonkers argues strongly against a finding that the opposition was genuinely site-specific and race-neutral.[68]

Further indications of a racial aspect to the opposition include the evidence that there was longstanding and, since the mid-1960's, increasing racial polarization in Yonkers, *cf., e.g., Kennedy Park Homes Association* v. *City of Lackawanna,* 436 F.2d 108, 113 (2d Cir. 1970), *cert. denied,* 401 U.S. 190 (1971); *Smith* v. *Town of Clarkton, supra; United States* v. *City of Parma, supra;* the evidence that subsidized housing for senior citizens (which, unlike subsidized housing for families, tended to be heavily white) often provoked less opposition in heavily white areas, *cf., e.g., Atkins* v. *Robinson,* 545 F.Supp. 852, 874 (E.D.Va. 1982), *aff'd,* 733 F.2d 318 (4th Cir. 1984); *United States* v. *City of Birmingham, supra; United States* v. *City of Parma, supra,* 494 F.Supp. at 1091-94; *Gautreaux* v. *Chicago Housing Authority, supra,* 296 F.Supp. at 912; and the nature of the objections most often raised — objections based upon the "incongruity" of putting a subsidized housing project in a particular area; the belief that subsidized housing should be restricted to "slum" areas; concern about deterioration of the neighborhood and property values; and what City officials themselves disparaged as the "standard litany" of inadequacies. Such objections can be convenient substitutes for

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[68]Nor, in the context of the record as a whole, can this uniform community opposition to subsidized housing be persuasively explained as simply race-neutral opposition to *any* increases in the area's density. In this regard, *Citizens Committee for Faraday Wood* v. *Lindsay,* 362 F.Supp. 651 (S.D.N.Y 1973), *aff'd,* 507 F.2d 1065 (2d Cir. 1974), *cert. denied,* 421 U.S. 948 (1975), upon which the City relies, is clearly distinguishable. *Faraday Wood* involved opposition to a single project, not a pattern of opposition coinciding with the steady construction of unsubsidized multifamily buildings in the area. In addition, the project at issue in *Faraday Wood* was primarily middle income, an income range in which minorities are not disproportionately represented, and thus the project's opposition and subsequent abandonment were held not to warrant the careful scrutiny traditionally given to actions involving low-income housing. 507 F.2d at 1068-69; *see also United States* v. *City of Parma, supra,* 494 F.Supp. at 1099 n.65. Finally, the court in *Faraday Wood* found there to be little or no other evidence that the opposition to the project was racially motivated.

explicitly racial statements, and they have been construed as such when appearing in conjunction with other evidence of discriminatory intent. *See, e.g., Smith* v. *Town of Clarkton, supra; United States* v. *City of Birmingham, supra; United States* v. *City of Parma, supra.*

Finally, and most significantly, there is the testimony of the City's own officials and other on-the-scene observers. Numerous City officials — including a former mayor — and others who were directly involved in site selection acknowledged at trial that they themselves believed that much of the community opposition they encountered was racially influenced — specifically, influenced by the fear that subsidized housing would result in an "invasion" of minorities into the area.

To be sure, the evidence does not support a finding that the community opposition was based *wholly* upon race, or that the position of *every* community opponent was based, at least in part, upon race. But such findings could rarely, if ever, be made; nor are they required here. What *is* required, and what the evidence clearly supports, is a finding that the desire to preserve existing patterns of segregation has been a significant factor in the sustained community opposition to subsidized housing in East Yonkers and other overwhelmingly white areas of the City. *See, Smith* v. *Town of Clarkton, supra,* 682 F.2d at 1066; *United States* v. *City of Birmingham, supra,* 538 F.Supp. at 826.

The evidence is equally clear that City officials consistently responded to that opposition. While a single instance of the rejection or abandonment of a proposed action following the emergence of community opposition may not create a strong inference that the decision was a response to the opposition, a *pattern* of opposition followed by rejection or abandonment is another matter, particularly when the political system controlling the decision-making process is shown to be hypersensitive to adverse community reaction. Here, as noted above, there is evidence of a pattern of more than thirty years' duration, and of a

political system in which the ward councilman exercised unusual influence over the Council as a whole, and in which ward residents, in turn, exercised unusual influence over the ward councilman.

In addition, the record is replete with contemporaneous statements and trial testimony by City officials and other on-the-scene observers which further suggests that for more than thirty years, the site selection process for subsidized housing was dominated by the unwillingness of the City Council to approve or support a site in the face of community opposition. The single most notable, but by no means only, testimony in confirmation of the effect of community opposition was that of Mayor Alfred Del Bello, who testified to the "tremendous pressure" put on East Yonkers councilmembers by the opponents of subsidized housing, and who stated flatly that the reason why the numerous sites selected during his administration were all in Southwest Yonkers was that they were the only sites the City Council would approve.

The City has suggested that the plaintiffs are required to prove, on a vote-by-vote basis, that the desire to appease racially influenced community opposition was the deciding factor for a specific, identified majority of the City Council or other City agency responsible for each action at issue in the case.[69] If indeed

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[69]In support, the City has cited two cases involving challenges to a single action by a single body of officials. *See United States* v. *City of Birmingham, surpa; Robinson* v. *12 Lofts Realty Co.*, 610 F.2d 1032 (2d Cir. 1979). However, although both courts engaged in some vote tallying, neither in any way suggested that such a procedure was the only means of establishing the collective intent of a voting body. Nor, it should be added, did either require a showing that a *majority* of the officials were influenced by racial discrimination. In *City of Birmingham*, the court defined the intent of a city as the intent of a "significant percentage of those responsible for the City's conduct." 538 F.Supp. at 828. In *Robinson*, the court stated that a collective vote was discriminatory if *any* of the individual votes needed for a majority was based on racial considerations. 610 F.2d at 1039-40. Such formulations merely elaborate the general rule that plaintiffs must prove that discriminatory intent was indeed a factor (although not necessarily the sole or even dominant factor) in the challenged decisionmaking process, *Arlington Heights I, supra*, 429 U.S. at 265-66. As such, those formulations are fully consistent with the approach that has been taken here.

this were the legal standard, however, the burden of proving discriminatory intent would no longer be merely difficult, but instead virtually impossible. And, in fact, it clearly is not the standard.

To the contrary, it is well established that the intent of collective actions can, and often must, be established circumstantially. *See Arlington Heights I, supra,* 429 U.S. at 266-68. For, as one court observed, "[i]f proof of a civil right violation depends on an open statement by an official of an intent to discriminate, the Fourteenth Amendment offers little solace to those seeking its protection." *Dailey* v. *City of Lawton,* 425 F.2d 1037, 1039 (10th Cir. 1970). And as the Supreme Court noted in *Personnel Administrator of Massachusetts* v. *Feeney,* 442 U.S. 256 (1979):

> The inquiry [into intent] is practical. What a legislature or any official entity is 'up to' may be plain from the results its actions achieve, or the results they avoid. Often it is made clear from what has been called, in a different context, "the give and take of the situation."

442 U.S. at 279 n.24 (citiation omitted).

Here, based upon the pattern of actions taken, the political structure of the decisionmaking process, and the statements of City officials and others involved in City affairs, there can be little doubt that with respect to the selection of sites for subsidized housing, appeasement of racially influenced community opposition was an important factor for a very "significant percentage of those who were responsible for the city's conduct," *United States* v. *City of Birmingham, supra,* 538 F.Supp. at 828.

The City has offered various alternative explanations for the pattern of sites approved by City officials, but the explanations are plausible only if evaluated in the abstract. When applied to the record, none raises any significant doubt about the effect of community opposition on site selection.

The explanation most vigorously pressed by the City is that the concentration of sites in Southwest Yonkers reflects nothing more than a strategy to use subsidized housing to revitalize the Southwest. That explanation, however, is simply not supported by the record. With respect to the pre-Riverview period (HOUSING III *supra*) there is little in the record to suggest that there was a conscious decision to focus on the Southwest in choosing sites for subsidized housing, and much to suggest the contrary. With respect to the Riverview period, there is little to suggest that any decisions to do so were unrelated to the continuing community opposition to the placement of subsidized housing elsewhere in the City. Indeed, the sequence of events preceding site selections during this period, and the testimony of former Mayor DelBello and others, strongly suggest the contrary. With respect to the post-Riverview period (HOUSING V *supra*), the continued concentration of subsidized housing in the Southwest in fact ran *counter* to at least some aspects of the stated planning strategy of the City.[70]

Nor does the record support the City's suggestion that despite the evidence of pervasive community pressures, the site selection process over the years was governed by the routine application of standard planning criteria. In addition to the strikingly predictable effect that the existence of community

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[70]A significant portion of the City's proposed conclusions of law is devoted to a lengthy review of federal housing statutes, regulations, and HUD publications, apparently intended, at least in part, to show that a reasonable and race-neutral city could have construed national housing policy as encouraging confinement of subsidized housing to Southwest Yonkers. Since the record clearly suggests, however, that this was not in fact how subsidized housing came to be confined to the Southwest, the argument is irrelevant.

Nor is the City's review of national housing policy persuasive as an attempt to suggest that the City's actions are illegal only under recently enunciated standards. None of the materials cited by the City suggest, or can in any way be read as suggesting, that the intentional confinement of subsidized housing to particular areas of a city in order to preserve existing patterns of segregation is permissible.

opposition had on the fate of proposed sites, the record reflects repeated disregard of Planning Board objections or recommendations; inconsistent application of stated planning criteria; and, in general, varying degrees of scrutiny depending upon whether the site in question was east or west of the Saw Mill River Parkway. *See Arlington Heights I, supra,* 429 U.S. at 267.

Nor, it should be emphasized, is there any basis for doubt that City officials were fully aware that the course they were pursuing was one of segregation. The potentially segregative or integrative effect of site selections was publicly addressed at least as early as 1958; and from the mid-1960's on, the issue was regularly raised by community leaders, HUD representatives, and the City's own officials. *Cf., e.g., United States* v. *City of Parma, supra,* 494 F.Supp. at 1097 (segregative effect not only foreseeable, but actually foreseen).

Yet, City officials continued to accede to community opposition which they believed, according to their own testimony, to be influenced by fear that construction of subsidized housing would result in an invasion of minorities into the surrounding area. Indeed, during the "post-Riverview" period, numerous City officials not only responded to, but, in the words of the campaign literature of some, "led the fight against subsidized housing in East Yonkers." That "flight" has included, most notably, a three-year refusal to apply for Section 8 Existing Certificates for Families — a refusal this Court finds inexplicable except on the basis of fear that minorities might use the certificates to relocate to East Yonkers — and the attempted sale of School 4 (a site widely viewed as a potential site for subsidized housing in East Yonkers) under circumstances which provide a virtual compendium of the factors that courts have been charged to look for in order to detect the presence of discriminatory intent. *See Arlington Heights I, supra,* 429 U.S. at 266-68.

In short, we find the unusual scope and complexity of plaintiffs' contentions to be matched by evidence of discrimina-

tory intent that is itself unusual in its strength and abundance. Having considered the evidence in its entirety, this Court is fully persuaded that the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation. This pattern of discriminatory actions is evident as early as the first selection of sites for public housing under the National Housing Act of 1949, and it has continued, unbroken, through the attempted sale of School 4 in 1982.[71]

Two remaining issues merit brief discussion. One concerns the effect of HUD's involvement in the City's subsidized housing activities; the second, the City's contention that regardless of whether race had been a factor in site selection, the results would have been precisely the same.[72]

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[71]Strictly speaking, the City's liability under the Fair Housing Act (the sole basis of the action brought by the United States) is limited to that portion of the pattern and practice of discrimination which occurred after April 11, 1968, the effective date of the Act, *see* 42 U.S.C. § 3603(a)(1), while its liability under the Constitution (the second basis of Plaintiff-intervenors' action) is premised upon the entire pattern and practice. However, the distinction appears to have little, if any, practical effect, since the measures that will be available and appropriate to remedy the effects of the City's discrimination are not likely to vary according to whether liability runs from 1950 or from 1968.

[72]A third issue raised by the City — the timeliness of plaintiffs' suit — can be dismissed without discussion. Although many of the actions challenged by plaintiffs occurred years ago, they are part of a continuing pattern and practice of discrimination, and as such they remain subject to suit. *See, e.g., Havens Realty Corp.* v. *Coleman*, 455 U.S. 363, 380-81; *United States* v. *Parma*, *supra*, 661 F.2d at 573. The application of laches that has been urged by the City (limitation of plaintiffs' case to events that occurred no earlier than three years prior to the date on which suit was filed) would preclude any effective remedy for a pattern and practice of discrimination. The City's argument is without precedent and (at least on the facts of this case) wholly without merit.

During the course of trial and in its post-trial submissions, the City has raised a variety of arguments relating to the effect of HUD's approval of the sites upon which subsidized housing has been constructed in Yonkers. In particular, the City has urged that HUD is entitled to great deference in its determination that each of the sites complied with all legal requirements, and even that HUD's approval "insulates" the City from any liability with respect to those sites.

However, the City has cited no case, nor are we aware of any, which has held that a site's approval by HUD creates any presumption that segregative intent was not at work in its selection.[73] Nor do we believe that such a presumption would be appropriate, at least in the present case. As an initial matter, the case before us is a pattern and practice case, the very essence of which is a recognition that the illegal basis of actions may emerge clearly only when the actions are viewed together. *See United States* v. *City of Parma*, *supra*, 494 F.Supp. at 1055 (citing cases). In such a case, any approval of individual actions necessarily must carry limited weight.[74]

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[73]All but one of the cases cited by the City are inapposite since they are limited to the review of a HUD finding that a proposed project complied with specific statutory or regulatory requirements unrelated to the intent with which a site has been selected. *See Business Association of University City* v. *Landrieu*, 660 F.2d 867 (3d Cir. 1981); *Aertsen* v. *Landrieu*, 637 F.2d 12 (1st Cir. 1980); *South East Chicago Commission* v. *HUD*, 488 F.2d 1119 (7th Cir. 1973); *Croskey Street Concerned Citizens* v. *Romney*, 459 F.2d 109 (3d Cir. 1972). Only one case cited by the City, *Jones* v. *Tully*, 378 F.Supp. 286 (E.D.N.Y. 1974), *aff'd*, 510 F.2d 961 (2d Cir. 1975) (per curiam), also included a claim of discriminatory intent in site selection, and that case contradicts rather than supports the City's argument, since the court clearly made its own determination that there had been no discriminatory intent at work in the site selection, and in no respect suggested that the determination was based on any presumption arising from HUD's approval of the project. *See* 378 F.Supp. at 293.

[74]The City contends that the United States has conceded the individual legality of each of the site selections and thus cannot challenge their collective legality. It is clear, however, that the United States has made no such concession. In saying that it does not contest HUD's approval of any individual

(Footnote 74 continued on next page)

In addition, the record before us does not suggest that HUD's various approvals reflected an informed and considered judgment that the City's actions were not motivated, in whole or in part, by segregative intent. Indeed, the record reflects repeated expressions of concern about the basis of the City's actions, and repeated instances in which those concerns were pursued incompletely or not at all. Moreover, there is evidence that on more than one occasion the City misrepresented to HUD the extent of its efforts to achieve at least some measure of geographic dispersal of subsidized housing in Yonkers. In light of these circumstances, and in the context of the record as a whole, HUD's actions do not negate a finding that the City has engaged in pattern and practice of housing discrimination.

Nor do HUD's actions "insulate" the City from liability for the consequences of that discrimination. HUD has no power to excuse discriminatory acts or to waive, on behalf of those injured by them, the right to seek a remedy. Nor is the City's duty not to discriminate defined simply as a duty to comply with HUD's orders. Thus, HUD's longstanding "failure to insist" that the City construct at least some subsidized housing for families in East Yonkers — a failure the City has repeatedly stressed — has no bearing on the City's liability for the consequences if its persistent refusal to do so is later challenged and found to have been motivated by segregative intent.[75] In the face of abundant evi-

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(Footnote 74 continued from previous page)

sites, the United States has said no more than that it does not contend either that the sites were illegal under statutory or regulatory provisions unrelated to intent (*e.g.*, HUD's site selection criteria), or that HUD knew or should have known any of the site selections to have been influenced by segregative intent. Such a statement does not preclude the United States from arguing, or this Court from finding, that when viewed together, and in the context of the record as a whole, the segregative intent underlying the site selections (and, hence, their illegality) clearly emerges.

[75]The City's related contention that its actions were legal because they were in compliance with HUD site selection criteria or any other regulations effective at time of site selection is similarly mistaken. Such regulations could not, and do not profess to, define the parameters of a city's duty not to discriminate in site

(Footnote 75 continued on next page)

dence of a longstanding practice of racial discrimination in site selection for subsidized housing, the City cannot escape liability on the ground that HUD did not do more to encourage or compel the City to abandon that practice.

The remaining argument made by the City against entry of judgment for plaintiffs is based upon the principle that such a judgment is unwarranted if the defendant can establish that the same actions would have been taken even in the absence of a discriminatory motive. *See Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 287 (1977); *Arlington Heights I, supra*, 429 U.S. at 270 n.21.[76] In this regard, the City contends that the need for improved housing and general revitalization in Southwest Yonkers was so pressing that, whether or not race was a factor in site selection, precisely the same sites would have been chosen. In support, the City points to the Community Renewal Plan prepared by Patrick Kane of KRS

(Footnote 75 continued from previous page)

selection, and compliance with them is not a safe harbor for those who, in fact, are found to have discriminated.

[76]We note in passing the questionable utility of performing a separate "even if" analysis in a case such as this, involving not simply the isolated dismissal of a public employee, *cf. Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410 (1979); *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274 (1977), but a discriminatory pattern and practice involving the acts and omissions of governmental entities over a significant period of time. This concern is particularly relevant where evidence concerning the existence or absence of segregative intent has been introduced by all parties and has been considered collectively in making our determination of liability. *Cf. Diaz* v. *San Jose Unified School District*, 612 F.2d 411, 515 n.1 (9th Cir. 1979). To the extent that the "even if" analysis entails an examination of feasible alternatives to the segregative decisions made by the defendants or the significance of the non-racial factors allegedly relied upon in making those decisions, *see Brody-Jones* v. *Macchiarola*, 503 F.Supp. 1185, 1243 (E.D.N.Y. 1979), we have performed such an examination in rendering our Findings of Fact. Nevertheless, we undertake a separate examination if only to underscore our conclusion that segregative intent was a motivating factor in the acts and omissions that have led to the perpetuation and aggravation of housing and school segregation in Yonkers. *See* SCHOOLS VI. *infra*.

Associates, an outside planning consultant, and the testimony of David Portman, the City's expert witness on urban planning.

However, for many of the same reasons that this evidence failed to support the City's contention that its site selections were *in fact* unrelated to race, it likewise fails to suggest that the same sites would have been selected even if race had not been an issue. While Dr. Portman testified that an extreme concentration of subsidized housing in the Southwest would not have been unreasonable from a planning perspective, he also acknowledged that it was not the only means of responding to the needs of the area, nor even necessarily a preferable means. Such testimony scarcely suggests a strategy so compelling that it would have been pursued even if the decisionmaking process had not been influenced by the perceived need to select sites that would maintain existing patterns of segregation. Similarly, Patrick Kane's recommended plan, as reflected in the CRP, tells little about what might have happened in Yonkers if race had not been an issue in site selection since the plan itself was recommended after thorough research into past and present attitudes in Yonkers — research which Kane acknowledged to have led him to believe that there was pervasive community opposition to subsidized housing in East Yonkers, that the opposition was racially influenced, and that the prospects for approval of any site there were virtually nonexistent.

Moreover, much of the same evidence which has confirmed that this racially influenced community opposition did in fact have an effect on site selection — namely, evidence of disregard or compromise of previously stated planning objectives; failures to consult the City's Planning Bureau; the testimony of the City's Planning Director with respect to his opposition to many of the sites chosen by the City; the differing levels of scrutiny given to sites depending upon whether they were located east or west of the Saw Mill River Parkway; and inconsistent application of planning criteria — also preclude any rational finding that precisely the same sites would have been selected even if race had

not been a factor. In this regard, it bears particular emphasis that the widely acknowledged negative effects (economic as well as racial) that have resulted from the concentration of subsidized housing in Southwest Yonkers did not become apparent only after the fact. Instead they were the subject of repeated warnings (often from the City's own Planning Director) which were repeatedly ignored by City officials.

In sum, the record clearly demonstrates that race has had a chronic and pervasive influence on decisions relating to the location of subsidized housing in Yonkers. While the precise configuration of subsidized housing which would have arisen in the absence of that influence necessarily remains a matter of speculation, it is clear that "but for" that influence, a sighnificantly different result would have obtained. *See Givhan* v. *Western Line Consolidated School District*, 439 U.S. 410, 416-17 (1979).

SCHOOLS

I. THE CLAIMS OF UNLAWFUL SCHOOL SEGREGATION

This case is similar in some respects to the many cases which have arisen since the Supreme Court's 1954 decision in *Brown* v. *Board of Education* declaring that state-mandated racial segregation in public schools was unlawful. In subsequent cases, when a particular public school system has been found to be racially segregated, that condition has typically arisen as a result of a variety of complex and interrelated acts and omissions, rather than the overtly discriminatory operation of a statutorily-mandated dual school system. Thus, although racially segregated school facilities mandated by statute have been outlawed in New York State since the early 1900's N.Y. Educ. Law §3201 (McKinney 1970), this fact is merely the beginning of our inquiry, for we must determine whether the numerous actions and omissions

of the responsible City and school authorities in Yonkers have nevertheless created or maintained a segregated school system with the impermissible segregative intent proscribed by federal statute and by the Constitution.

In three significant respects, however, this case is different from the typical school desegregation case: the plaintiffs in this case have joined claims of unlawful school segregation with claims of governmental housing discrimination;[77] plaintiffs have alleged that both the City and the Board should be held liable for the intentional segregation of the Yonkers public schools; and resolution of plaintiffs' claims requires us to consider whether governmental housing discrimination is relevant to the determination of liability for school segregation.

Plaintiffs allege that the Board, by various acts and omissions, has caused the Yonkers public school system to become and remain racially segregated. Plaintiffs have sought to establish that the Board has engaged in various types of conduct which were intended to bring about and perpetuate such segregation. These segregative practices may be summarized in six major categories: (1) a pattern of segregative decisions with respect to the opening and closing of schools, and the alteration of attendance zone boundaries for racial reasons; (2) the assignment of faculty and administrative staff according to the racial composition of the students at individual schools; (3) the discriminatory classification, transportation, and other treatment of minority Special Education students; (4) the steering of minorities into vocational education programs and the subsequent screening of

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[77]In a number of school desegregation cases in which the issue of governmental housing discrimination has been raised, courts have noted that the relevant housing authorities were not joined as parties to the action. *See, e.g., Higgins* v. *Board of Education of Grand Rapids*, 508 F.2d 779, 789 (6th Cir. 1974); *Deal* v. *Cincinnati Board of Education*, 369 F.2d 55, 60 n.4 (6th Cir. 1966), *cert. denied*, 389 U.S. 847 (1967); *Brody-Jones* v. *Macchiarola*, 503 F.Supp. 1185, 1236-37 n.27 (E.D.N.Y. 1979); *Bronson* v. *Board of Education of the City School District of Cincinnati*, 578 F.Supp. 1091, 1104 (S.D.Ohio 1984).

minorities out of such programs and into inferior general academic programs; (5) the failure to provide minority students with equal educational opportunities; and (6) the failure to adopt, for racial reasons, various desegregative school reorganization and educational reform plans. Plaintiffs allege that these acts and omissions constitute a sufficient basis for a finding of unlawful school segregation independent of any actions or omissions on the part of the City.

In response, the Board alleges that the racial imbalance that exists in many of the district's schools has been caused by social, economic and demographic factors that are beyond its control. The Board contends that the various acts and omissions noted above were not intentionally segregative (or, in some instances, not in fact segregative regardless of intent) and that Board policies were essentially irrelevant in any event to the causes of racial imbalance in the schools. In addition, the Board contends that no affirmative action is constitutionally required of it to alleviate racial imbalance in the schools not caused by any intentionally segregative acts of the Board, and that adherence to its neighborhood school policy has been race-neutral in intent and is in any event an insufficient legal basis for a finding of liability.

As for the City, plaintiffs have sought to establish its liability for school segregation based on a number of factors, all of which have allegedly served to create and maintain racial imbalance in the Yonkers public schools. Plaintiffs claim that the City has intentionally confined the construction and placement of subsidized housing to Southwest Yonkers in part to confine minority students to public schools in this area of the city, and that such conduct is, standing alone, a basis for finding the City liable for the racial segregation of the schools. In addition, plaintiffs contend that the City's involvement in educational affairs — including the site selection process for newly constructed schools; the Mayor's appointment of Board members; and the City Council's budgetary control over the Board and "will of the Council"

resolutions — has given the City significant influence and effective control over the Board and has been designed in part to perpetuate the racial segregation of the Yonkers public schools. Plaintiffs contend that the City's influence and control over school affairs, together with its subsidized housing practices, constitute adequate grounds for holding the City liable for the racial segregation of the schools.

The City contends that neither its housing practices nor its involvement in school affairs are a proper basis for a finding of municipal liability for the racial segregation of Yonkers public schools. The City argues that a policy of restricting the location of subsidized housing to Southwest Yonkers, whether or not violative of Title VIII and the Constitution, does not constitute legal grounds for a finding of unlawful school segregation and that, as a factual matter, its housing practices have not caused or exacerbated racial segregation in the Yonkers public schools. The City also argues that it has neither legal nor practical control over the Board of Education and thus is not responsible for the segregation of the Board-operated schools. The City has attempted to show that the City's budgetary appropriation power, the mayoral appointments to the Board, the City's involvement in school site selection, the City Council resolutions have not resulted in City control over the school district and have not been used to intentionally cause or maintain racial segregation in the Yonkers public schools.

II. LEGAL STANDARDS

The legal standards governing the school desegregation portion of this case have evolved from the Supreme Court's historic decision in *Brown* v. *Board of Education*, 347 U.S. 483 (1954). In *Brown*, the Supreme Court held that statutorily imposed separate school facilities for blacks and whites were unconstitutional. Since that decision, a myriad of school desegregation cases have established that less blatant forms of racial segregation in public

schools are similarly unlawful. It is equally clear, however, that the mere existence of racially segregated schools does not constitute a federal constitutional or statutory violation. *Columbus Board of Education* v. *Penick*, 443 U.S. 449, 464 (1979); *Keyes* v. *School District No. 1*, 413 U.S. 189, 198 (1973); *Alexander* v. *Youngstown Board of Education*, 675 F.2d 787, 791 (7th Cir. 1982); *Arthur* v. *Nyquist*, 573 F.2d 134, 141 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). Similarly, the mere existence of *de facto* segregation does not create an obligation on the part of a school board to alleviate or rectify such segregation. *See Diaz* v. *San Jose Unified School District*, 733 F.2d 660, 664 (9th Cir. 1984) (en banc), *cert. denied*, 105 S.Ct. 2140 (1985); *Alexander* v. *Youngstown Board of Education*, *supra*, 675 F.2d at 791; *Parent Association of Andrew Jackson High School* v. *Ambach*, 598 F.2d 705, 713 (2d Cir. 1979) ("If there is no *de jure* segregated school system, there is no judicially-enforceable constitutional obligation, under existing law, to take affirmative action to remedy racial imbalance."). Under current legal standards, plaintiffs have the burden of demonstrating that (1) the Yonkers public schools are racially segregated; (2) such segregation was created or maintained by the intentionally segregative conduct of governmental authorities; and (3) such conduct has affected the school system as a whole. *See Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 205-09 (1973); *Arthur* v. *Nyquist*, *supra*, 573 F.2d at 141.

Each of these elements has been explored in prior school desegregation decisions. As for the first element, the existence of racial segregation need not be numerically absolute so long as the public schools are substantially segregated and racially identifiable. *Arthur* v. *Nyquist*, 415 F.Supp. 904, 912 n.9 (W.D.N.Y. 1976), *aff'd on reconsideration*, 429 F.Supp. 206 (W.D.N.Y. 1977), *aff'd in part and rev'd in part on other grounds*, 573 F.2d 134 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978); *see also Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 196. Blacks and hispanics are to be considered as a group in determining whether the

school system is racially segregated. *See Keyes* v. *School District No. 1, supra*, 413 U.S. at 197-98; *Hart* v. *Community School Board of Education, New York School District #21*, 512 F.2d 37, 45 n.10 (2d Cir. 1975); *see also* Alioto Dep. 34; Schainker Dep. 32; Tr. 10,973-74 (Jacobson).

The second element encompasses a number of legal concepts: causation, state action and intent. As for caustion, the conduct of school authorities need not be the sole cause of racial segregation, but such conduct cannot be of trivial or *de minimus* impact. Plaintiffs must demonstrate that the defendant's conduct has contributed in a substantial manner to the creation or perpetuation of racial segregation. *Berry* v. *School District of Benton Harbor*, 442 F.Supp. 1280, 1292 (W.D.Mich. 1977). In addition, the "conduct" of school authorities includes omissions as well as affirmative acts. Thus, although the mere failure to act, without more, does not form the basis for a finding of *de jure* segregation, *see Hart* v. *Community School Board, supra*, 512 F.2d at 48; *Brody-Jones* v. *Macchiarola*, 503 F.Supp. 1185, 1248 (E.D.N.Y. 1979), the inaction of school authorities may be considered along with evidence of school board action in determining whether the racial segregation of the public schools has been brought about or maintained in an unlawful manner. *See Parent Association of Andrew Jackson High School* v. *Ambach, supra*, 598 F.2d at 714; *NAACP* v. *Lansing Board of Education*, 559 F.2d 1042, 1046-47 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977); *Morgan* v. *Kerrigan*, 509 F.2d 580, 586 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975).

The intent requirement has been discussed previously in this Opinion. *See* HOUSING II *supra*. In applying this requirement, many of the school desegregation cases of the 1970's relied in significant part on evidence that the conduct of the relevant school authorities had a foreseeably segregative impact. Some courts went so far as to hold that a

> presumption of segregative purpose arises when plaintiffs establish that the natural, probable, and foreseeable result of public officials' action or inaction was an increase or perpetuation of public school segregation. The presumption becomes proof unless defendants affirmatively establish that their action or inaction was a consistent and resolute application of racially neutral policies.

Oliver v. *Michigan State Board of Education*, 508 F.2d 178, 182 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975); *see United States* v. *Texas Education Agency*, 532 F.2d 380, 388-89 (5th Cir.), *vacated and remanded sub nom. Austin Independent School District* v. *United States*, 429 U.S. 990 (1976); *United States* v. *School District of Omaha*, 521 F.2d 530, 536 (8th Cir.), *cert. denied*, 423 U.S. 946 (1975); *see also Hart* v. *Community School Board*, *supra*, 512 F.2d at 51. While the Supreme Court, in *Dayton Board of Education* v. *Brinkman*, has rejected the use of such a presumption as a means of establishing segregative intent or shifting the burden of persuasion on the intent issue to the defendant, 443 U.S. 526, 536 n.9 (1979), the Court nevertheless reaffirmed that "proof of foreseeable consequences is one type of quite relevant evidence of racially discriminatory purpose." *Id.*; *see also Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 464-65 (foreseeable effect of decision is "one of the several kinds of proofs from which an inference of segregative intent may properly be drawn"); *Alexander* v. *Youngstown Board of Education*, *supra*, 675 F.2d at 792-93 (court may infer discriminatory intent from acts or policies with foreseeably segregative result; inference is permissible rather than mandatory).

In evaluating whether the decisions of school authorities were motivated by segregative intent, courts have analyzed evidence of foreseeable impact in conjunction with other evidence or surrounding circumstances in order to determine whether the challenged decision was intentionally segregative. Thus, while a presumption of intent does not automatically flow from evidence

of foreseeability, an inference of intent may be appropriate where a foreseeably segregative decision is made despite the existence of less segregative alternatives which were consistent with the educationl objectives or policies of school officials or were even more in keeping with these goals or policies. *See Arthur* v. *Nyquist, supra,* 573 F.2d at 142;[78] *United States* v. *Board of School*

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[78]There is considerable disagreement among the parties regarding the continued validity of the Second Circuit's school desegregation decisions, particularly *Hart* v. *Community School Board* and *Arthur* v. *Nyquist.* In those decisions, the Second Circuit cited with approval the foreseeability test for determining the existence of segregative intent. *Arthur* v. *Nyquist, supra,* 573 F.2d at 143; *Hart* v. *Community School Board, supra,* 512 F.2d at 51. While this test was subsequently disavowed by the Supreme Court in *Dayton,* it is also clear that the Second Circuit's decisions did not rest entirely on the foreseeability presumption in upholding the district courts' respective findings of segregative intent. In *Arthur,* the Second Circuit described its decision in *Hart* as holding that "foreseeable consequences, while not specifically identifiable with intention, can provide evidence for its presence" and that "segregative intent could only be inferred in the context of an examination of alternative policies available to state officials." 573 F.2d at 142. Moreover, a careful reading of the district and circuit court opinions in *Arthur* confirms that the findings of segregative intent did not rest solely on the foreseeability presumption but on an examination of alternative courses of action, the reasons proferred for the school board's segregative conduct, and the school board's response to the known segregative impact of its policies and practices. 415 F.Supp. at 930 (failure to amend language program policy even though board was "obviously aware of its segregative impact"); 936 (school districting decision is "an example of blatant segregative intent with clear segregative results"); 939 (knowing granting of transfers for "specious or blatantly discriminatory reasons"); 940-41 (deliberate adherence to segregative optional attendance zone policy for which "[n]o rational reason" was found; 942 (adherence to segregative screening criteria for vocational schools); 946 (deliberately segregative staff assignment policy); 948-49 (failure to devise and implement desegregation plan in response to state integration order); 429 F.Supp. 206 (liability decision reaffirmed upon reconsideration in light of Supreme Court's decisions in *Austin Independent School District* v. *United States, Washington* v. *Davis,* and *Arlington Heights* v. *Metropolitan Housing Development Corp.*); 573 F.2d at 143-45 (affirming aforementioned findings of intent). In our view, this mode of analysis is consistent with the Supreme Court's subsequent decisions in *Dayton* and *Columbus* regarding the relevance of foreseeable segregative impact. *See Alexander* v. *Youngstown Board of Education, supra,* 675 F.2d at 792-93; *Berry* v. *School District of Benton Harbor,* 494 F.Supp. 118, 123 (W.D.Mich. 1980).

Commissioners of Indianapolis, 573 F.2d 400, 413 (7th Cir.), *cert. denied,* 439 U.S. 824 (1978); *Penick* v. *Columbus Board of Education,* 429 F.Supp. 229, 240-41 (S.D.Ohio 1977), *aff'd in part and vacated in part,* 583 F.2d 787 (6th Cir. 1978), *aff'd,* 443 U.S. 449 (1979); *Berry* v. *School District of Benton Harbor,* 494 F.Supp. 118, 123 (W.D.Mich. 1980). The lack of a persuasive or credible explanation for foreseeably segregative conduct of school authorities may also justify an inference that such conduct was intentionally segregative. *See United States* v. *Texas Education Agency,* 600 F.2d 518, 528-29 (5th Cir. 1979); *Arthur* v. *Nyquist, supra,* 415 F.Supp. at 939-41; *Berry* v. *Benton Harbor, supra,* 494 F.Supp. at 123. A consistent pattern of foreseeably segregative decisions may also suggest that the resulting segregative consequences were intentional, rather than accidental or unavoidable, in nature. *See Parent Association of Andrew Jackson High School* v. *Ambach, supra,* 598 F.2d at 713; *United States* v. *Board of School Commissioners of Indianapolis, supra,* 573 F.2d at 412. In short, the Court must examine all the relevant facts and circumstances surrounding the foreseeably segregative decisions of school authorities in order to determine whether a finding of segregative intent is warranted.

As noted previously, foreseeable segregative impact is not the only evidence upon which a finding of segregative intent may properly be based. A court may also examine the historical background of decisions, the specific sequence of events leading up to such decisions, departures from normal procedural sequence or substantive criteria normally considered important by the decisionmaker; contemporaneous evidence concerning the decisionmaking process; or the testimony of decisionmakers regarding the purposes of official acts. In addition, proof that officials were responsive to the discriminatory purposes of others in making a decision may be relied upon to establish segregative intent. *See* HOUSING II *supra.* If plaintiffs are successful in establishing their *prima facie* case of intentional segregation of Yonkers public schools, the burden is then on the defendant to establish that the

same segregative conduct would have occurred "even had the impermissible purpose not been considered." *Village of Arlington Heights* v. *Metropolitan Housing Development Corp.*, 420 U.S. 252, 271 n.21 (1977); *see Brody-Jones* v. *Macchiarola, supra,* 503 F.Supp. at 1238.

Third, the intentionally segregative conduct of school authorities must result in the creation or perpetuation of racial segregation throughout the school district; that is, the segregation must be systemwide. Plaintiffs need not specifically show, however, that every school or student was affected by the unlawful conduct of the defendant. Rather, plaintiffs must demonstrate that school authorities have effectuated an intentionally segregative policy in a meaningful or significant portion of the school system. Such proof creates a presumption that the racial segregation of the remaining segment of the system is not inadvertent, and places a burden of proof on the defendant to show that other segregated schools within the system are not also the result of intentionally segregative conduct. *Keyes* v. *School District No. 1, supra,* 413 U.S. at 208-11.

Considerable ambiguity exists as to the relevance of a school board's application of a neighborhood school assignment policy to its liability for school segregation. A number of courts have concluded that adherence to such a policy is not a *per se* violation of the Constitution. These decisions have observed that the application of such a policy is supported by a variety of nondiscriminatory considerations and therefore may generally be considered a permissible, albeit segregative, form of official action. *See Keyes* v. *School District No. 1, supra,* 413 U.S. at 245-48 (Powell,J., concurring in part and dissenting in part); *Spangler* v. *Pasadena City Board of Education,* 611 F.2d 1239, 1244-45 (9th Cir. 1979) (Kennedy,J., concurring); *United States* v. *Texas Education Agency,* 564 F.2d 162, 168-69 & n.9 (5th Cir. 1977), *petition for rehearing denied,* 579 F.2d 910 (5th Cir. 1978) (en banc), *cert. denied,* 443 U.S. 915 (1979); *NAACP* v. *Lansing*

Board of Education, supra, 559 F.2d at 1049; *Deal* v. *Cincinnati Board of Education,* 369 F.2d 55, 60 (6th Cir. 1966), *cert. denied,* 389 U.S. 847 (1967); *Brody-Jones* v. *Macchiarola, supra,* 503 F.Supp. at 1247. Thus, a school district with no prior history of *de jure* segregation is not required to abandon its neighborhood school policy merely because adherence to such a policy results in the perpetuation of segregated schools. *See Diaz* v. *San Jose Unified School District, supra,* 733 F.2d at 664.

It is also apparent, however, that the mere invocation of the neighborhood school policy as a defense to a school desegregation lawsuit is not dispositive of the liability determination. Instead, a school board's alleged application of and adherence to a neighborhood school policy must be examined in the context of other official acts and omissions in order to determine whether the policy exists and is in fact free of segregative purpose or intent. Among the most relevant factors to consider is the extent to which the neighborhood school policy is applied in a consistent manner; for example, the use of optional or non-contiguous attendance zones or out-of-district student transfer policies has been relied upon as evidence that a neighborhood school policy is either non-existent or sufficiently marked by segregative exceptions so as to be an implausible explanation for school segregation. *See Columbus Board of Education* v. *Penick, supra,* 443 U.S. at 461-62 & n.8-9; *Arthur* v. *Nyquist, supra,* 573 F.2d at 145 n.21; *NAACP* v. *Lansing Board of Education, supra,* 559 F.2d at 1056-57; *Armstrong* v. *O'Connell,* 451 F.Supp. 817, 829-30 (E.D.Wis. 1978); *Berry* v. *Benton Harbor, supra,* 442 F.Supp. at 1325-26. In rejecting the neighborhood school policy defense, courts have also relied upon a school board's selection of segregative student assignment or school construction policies where less segregative alternatives were available which could have been implemented without violating the district's neighborhood school policy. *See Diaz* v. *San Jose Unified School District, supra,* 733 F.2d at 665. Finally, a number of courts have held that a school district's adherence to a neighborhood school policy is constitutionally

unacceptable where discriminatory public housing practices have contributed to the racial segregation of the neighborhoods, a conclusion we will explore further in our Conclusions of Law. *See* SCHOOLS VI.B.1.c *infra*. In short, a full examination of the facts and circumstances surrounding a school board's formulation of and adherence to a neighborhood school policy is appropriate in determining whether the segregative impact of such a policy is the result of impermissibly discriminatory intent.

III. THE YONKERS PUBLIC SCHOOL SYSTEM

The Yonkers School District and Yonkers Board of Education were established in 1881. GX 125. The Yonkers School District is coterminous with the geographic boundaries of the City of Yonkers. According to state law, the Board is an independent municipal corporation subject to the control of the New York State Board of Regents and the Commissioner of Education. N.Y.Const., Art. 5, § 4; N.Y. Educ. Law §§ 305, 2551 (McKinney 1970). The Board is an agent of the state and is charged with the responsibility of providing education for public school children in the city. The Board consists of nine members who are appointed by the Mayor for five year staggered terms of office. Among the Board's powers is the authority to hire the Superintendent of Schools, the school district's chief administrative officer.[79] The Superintendent and his or her administrative staff are often involved in the development and implementation of policies affecting school construction and closings, the setting and changing of attendance zone lines, grade structure, personnel policies, and other educational matters. The Board is ultimately responsible for determining and approving the policies of the school district with respect to the aforementioned matters.

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[79]Since 1950, the school district has had five superintendents: Stanley Wynstra (1950-68), Paul Mitchell (1968-70), Robert Alioto (1971-75), Joseph Robitaille (1975-78), and Joan Raymond (1979-present).

The City of Yonkers also has specific legal powers relating to the operation of the Yonkers public schools. Under state law, the Yonkers City Council is empowered to appropriate an annual budget for the school district. The Mayor of Yonkers is also responsible under state law for appointing members of the Board of Education. City officials also have participated in the selection of sites for the construction of schools and in a variety of other educational matters. The manner in which these legal responsibilities and participating roles have in fact been exercised and the resulting impact on the Yonkers public schools will be explored further in our discussion of the City's liability for the racial segregation of the schools.

The segregation of the Yonkers public schools is best understood against the backdrop of the demographic changes occurring in the city and the Board's role in minimizing and exacerbating these trends. To a large extent, the development of the racial segregation in the Yonkers public schools has reflected the residential segregation of geographic areas surrounding these schools. We have previously described in some detail the demographic development of the city, *see* HOUSING I *supra*, and we incorporate that discussion herein. We will discuss the development of the district's school system and its increasing racial segregation in further detail as part of our findings regarding school openings and closings and school attendance zone changes. *See* SCHOOLS IV.A.1 *infra*.

As an initial matter, it is helpful to understand the geographic, structural, numerical, and other characteristics of the Yonkers public schools.[80] As of the 1980-81 school year, the

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[80]It is important to note that our findings with respect to the racial segregation of Yonkers public schools and our evaluation of evidence concerning the practices and policies governing the operation of these schools are based, unless specifically noted, on the schools as they existed in 1980 when this lawsuit was commenced. Almost five years have passed since that time, during which changes in racial balance, program offerings, and educational policies or prac-

(Footnote 80 continued on next page)

Yonkers public school system was comprised of twenty-three elementary schools, two combined elementary/middle schools, four middle schools, and five high schools. The elementary schools consist of grades K-6, with three schools enrolling a small number of pre-kindergarten (pre-K) students as well.[81] Two schools, Emerson and Twain, contain students from grades K-8. (The elementary school portion of Twain is also referred to as School 11; the elementary portion of Emerson is also referred to as School 34). The middle school portions of these schools draw students from elementary school attendance areas other than that of their respective elementary school components. The five high schools consist of four general academic high schools and the Saunders Trades and Technical High School, a districtwide vocational and technical school in Central Yonkers. The district also operates a Career Center for high school students and post-graduate individuals, offering various occupational education programs. SB 746, at 114.[82] Most of the district's schools also enroll students who have been assigned to one of the district's Special

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(Footnote 80 continued from previous page)

tices have occurred, some of which this Court may well be unaware of and thus cannot be reflected in these findings. Where post-1980 occurrences have been shown to be relevant insofar as they represent a definite and recognizable continuation of a previously existing policy or pattern of behavior, these occurrences have been discussed in our findings where applicable. All other post-1980 occurrences, while relevant to our formulation of remedial measures to correct the racial imbalance in the public schools, have not been relied upon in our determination of liability. *United States* v. *Board of School Commissioners of Indianapolis*, 474 F.2d 81, 89 (7th Cir.), *cert. denied*, 413 U.S. 920 (1973).

[81]The pre-K program originated in a small number of Southwest Yonkers elementary schools, and was expanded to many of the City's elementary schools as a result of a 1973 school reorganization plan. GX 64, 114. The program was drastically curtailed as a result of the school district's 1976 budget reductions. *See* SCHOOLS IV.A.3.b *infra*. In 1980-81, the pre-K program, operated in Schools 9, 18 and 25, enrolled 90 students and was 49% minority. No allegations or evidence of unlawful segregation have been presented by plaintiffs with respect to the operation of the pre-K program.

[82]In 1980-81, the Career Center enrolled 103 students and was 62% minority. GX 64. No allegation or evidence of unlawful segregation has been presented by plaintiffs with respect to the operation of the Career Center.

Education programs. The attendance zone maps for the Yonkers public schools are included as Appendix B, C and D to this Opinion. *See* SB 626-628. The school zone boundaries reflect those in existence as of the 1980-81 school year.

The decline in white population in Yonkers and the simultaneous rise in minority residents has been reflected in public school enrollments as well. This phenomenon is reflected in the following table:

Yonkers Public School Student Population

Year	White[83]	% White	Minority[84]	% Minority	Total
1967	25,875	85	4,421	15	36,296
1970	25,049	82	5,583	18	30,632
1975	21,514	72	8,195	28	29,709
1980	13,840	63	8,023	37	21,863

GX 64. Thus, from 1967 to 1980, the district's white student enrollment declined by over 12,000, or 47%; minority student enrollments rose by over 3,600, or 81%.

The decline in white student enrollment during the 1970's is also reflected in the non-public school enrollments during this period of time:

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[83] "White" includes caucasian, Indian-American, Asian-American, and any other non-"minority" students. In 1980-81, there were 352 Asian/Pacific Island Americans (1.6%), 11 American Indian/Alaskans (0.1%), and 13,477 caucasions and other non-minorities (61.6%) enrolled in Yonkers public schools. SB 752.

[84] "Minority" includes black and hispanic students. *See* SCHOOLS II *supra*.

Yonkers Non-Public School Student Population

Year	White	% White	Minority	% Minority	Total
1969	10,011	94	612	6	10,623
1970	9,291	93	706	7	9,997
1975	7,071	88	970	12	8,041
1980	6,149	79	1,654	21	7,803

SB 98. As these figures reflect, the non-public school white student enrollment has decreased at a slower rate than for public schools, while the non-public school minority enrollment has increased at a far more rapid rate. White student enrollment has declined by almost 4,000 students, or 39%; minority student enrollment has increased by just over 1,000 students, or 170%.

The general decline in student enrollment is reflected in attendance figures for individual public schools as well. From 1973 to 1980, only five of the district's 25 elementary schools experienced an increase in enrollment — Schools 10, 18, 19, 23 and 27, all in Southwest Yonkers. On the secondary school level, only two schools have experienced increases in student enrollment during this period — Saunders, primarily because of its 1980 relocation to the recently built Burroughs facility; and Yonkers High School, which was relocated in 1974 to a newly constructed facility and enrolls students from the School 10, 18, 19, 23 and 27 attendance zones.

The extent to which a school system is racially segregated can be determined by examining a number of factors: the racial composition of each school's student body, the racial composition of the school's faculty and staff, the community's and school administration's perceptions or attitudes toward the schools, and the physical characteristics of the schools. *Keyes* v. *School District No. 1, supra,* 413 U.S. at 196; *Berry* v. *Benton Harbor, supra,* 442, F.Supp. at 1298. An evaluation of these criteria reveals that the racially segregated nature of the Yonkers public schools is systemwide.

By 1980-81, the school year in which this suit was filed, the segregated nature of the Yonkers public schools' student enrollment was clear. The following represents the racial enrollment data for the district's twenty-five elementary schools, six middle schools and five high schools:

Elementary Schools

School	Location	White	Minority	Total
5	Central	373 (90%)	42 (10%)	415
6	SW	4 (21%)	219 (98%)	223
8	NE	307 (99%)	2 (1%)	309
9	SW	150 (37%)	254 (63%)	404
10	SW	45 (10%)	416 (90%)	461
11 (Twain)	SE	440 (96%)	18 (4%)	458
13	SW	503 (62%)	307 (38%)	810
14	SE	393 (96%)	16 (4%)	409
16	NW	235 (90%)	27 (10%)	262
17	SE	255 (98%)	8 (2%)	263
18	SW	177 (25%)	519 (75%)	696
19	SW	96 (19%)	400 (81%)	496
21	SE	381 (94%)	23 (6%)	404
22	NW	222 (90%)	24 (10%)	246
23	SW	366 (55%)	303 (45%)	669
25	NW	39 (12%)	276 (88%)	315
26	NE	249 (94%)	15 (6%)	264
27	SW	206 (43%)	278 (57%)	484
28	NE	257 (95%)	14 (5%)	271
29	NE	252 (98%)	6 (2%)	258
30	SE	316 (93%)	25 (7%)	341
31	NE	155 (79%)	41 (21%)	196
32	NE	237 (93%)	19 (7%)	256
King	SW	14 (2%)	554 (98%)	568
34 (Emerson)	NW	223 (90%)	25 (10%)	248
TOTAL		5,895 (61%)	3,831 (39%)	9,726

Middle Schools

School	Location	White	Minority	Total
Emerson (7-8)	NW	301 (63%)	178 (37%)	479
Fermi (6-8)	SW	134 (38%)	221 (62%)	355
Hawthorne (7-8)	SW	222 (31%)	493 (69%)	715
Longfellow (6-8)	SW	13 (6%)	216 (94%)	229
Twain (7-8)	SE	646 (96%)	27 (4%)	673
Whitman (7-8)	NE	604 (94%)	35 (6%)	639
TOTAL		1,920 (62%)	1,170 (38%)	3,090

High Schools

School	Location	White	Minority	Total
Gorton	NW	634 (53%)	573 (47%)	1,207
Lincoln	SE	1,599 (98%)	38 (2%)	1,637
Roosevelt	NE	1,388 (91%)	134 (9%)	1,522
Saunders	Central	733 (84%)	144 (16%)	917
Yonkers	SW	875 (38%)	1,422 (62%)	2,297
TOTAL		5,269 (70%)	2,311 (30%)	7,580
SUBTOTAL, ALL SCHOOLS		13,084 (64%)	7,312 (36%)	20,396
Special Education		666 (53%)	583 (47%)	1,249
Pre-kindergarten		46 (51%)	44 (49%)	90
Career Center		39 (38%)	64 (62%)	103
TOTAL, ALL SCHOOLS		13,840 (63%)	8,023 (37%)	21,863

Thus, in 1980, nineteen out of twenty-five elementary schools were over 80% white or 80% minority. Almost one-half of the elementary schools' minority enrollment — 1865 students, or 49% — attended five schools in West Yonkers. Three of these schools were at least 90% minority; the other two — Schools 19 and 25 — were 81% and 88% minority, respectively. Over 70% of

the district's white elementary school students attended schools with at least 90% white students.

Racial imbalance among the district's secondary schools, while not as stark as on the elementary school level, was nevertheless clear for the majority of these schools. The two East Yonkers middle schools, Twain and Whitman, had between them only sixty-two minorities among their 1,312 students, or 5% of the district's minority middle school enrollment; the district's three Southwest Yonkers middle schools, Fermi, Hawthorne and Longfellow, each were at least 62% minority and enrolled 79% of the district's minority middle school students. Only one middle school — Emerson Middle School in Northwest Yonkers — can be characterized as a racially balanced school.

The district's regular high schools followed a similar pattern of racial imbalance. Lincoln and Roosevelt, the two East Yonkers High Schools, enrolled 8% of the district's minority high school students. Yonkers High School, a 62% minority school in Southwest Yonkers, enrolled 62% of the district's minority students; along with Gorton, the two West Yonkers high schools enrolled 92% of the district's regular minority high school students.

In sum, 64% of the district's white students were enrolled in schools of at least 90% white students, while 28% of the district's minority students were enrolled in schools with at least 80% minority enrollment. While some schools, such as School 13 (38% minority), School 23 (45%), School 31 (21%), and Emerson Middle School (37%) fairly reflect the racial population of Yonkers and the school population in particular (37% minority), most schools in the district are identifiably white or minority based on the factors discussed above. *Cf. Oliver* v. *Michigan State Board of Education*, *supra*, 508 F.2d at 183.

Other attributes of the Yonkers public schools also serve to delineate them as racially identifiable. The racial imbalance of the school district's faculty and administrative staff is similar to the

imbalance in student enrollments in its pattern of racial imbalance at all grade levels of the school system. As set forth in more detail later in these findings, the bulk of the district's minority staff members are assigned to schools with predominantly minority student enrollments. Many of the district's predominantly white schools, on the other hand, have few, or in some cases, no minority staff. While this disproportion has been reduced somewhat in recent years, the racial imbalance is still significant. *See* SCHOOLS IV.E *infra*.

The differences in the physical facilities of Yonkers public schools also adds to the racial indentifiability of the school system. As will be discussed in greater detail, the predominantly minority elementary schools are generally smaller, have less recreational space, and are generally characteristic of the minority, more urban character of Southwest Yonkers. *See* GX 1005. Middle schools with predominantly minority student bodies are significantly older, more limited in site size and recreational facilities, and similarly reflect their predominantly minority urban surroundings. Differences in the district's high school facilities, while considerably less drastic than on the elementary school level, are nevertheless detectable. *See* SCHOOLS IV.B.1 *infra*.

The community's and school officials' perceptions of the Yonkers public schools also support our finding that the Yonkers public school system as a whole is racially segregated. The racial identifiability of these schools generally reflects the demographic makeup of the communities in which these schools are situated, particularly at the elementary school level where neighborhood school assignments are largely responsible for this correlation. The evidence demonstrates that community and administrative personnel generally associate schools in Southwest Yonkers as minority schools, particularly Schools 6, 10, 18, 19, and King, which have long been considered minority schools. The only three exceptions to the general correlation of geographic location and racial identifiability are School 13, a 38% minority school located

in the Southeasternmost section of Southwest Yonkers (an historically white area); School 23, a 45% minority school, located north of School 13; and School 25, an 88% minority school abutting the Hudson River in Northwest Yonkers. Even Schools 13 and 23 are identifiably minority to the extent that they border on elementary school zones for School 21 (6% minority) and School 17 (2% minority), and to the extent that the School 23 zone includes a large identifiably minority subsidized housing project (Whitney Young Houses). School 25 is located within a narrow strip of land which, along with Runyon Heights, has historically been more heavily populated by minorities than any other area outside of Southwest Yonkers. The school's enrollment consists in part of students from the Seven Pines subsidized housing project and abuts the School 16 (10% minority) zone, an area which has long been an identifiably white school zone.

On the secondary school level, the pattern is somewhat less consistent but nevertheless clear. Longfellow has long been considered a minority school, with Hawthorne and Fermi more recently gaining this general reputation despite the fairly even balance among white, black and hispanic students at each of these schools. The district's high schools fall within a similar pattern. Although some black community members consider Yonkers High School (62% minority) to be an integrated school, Ryer Dep. 29; *see also* Tr. 12,912-13 (Dodson), it is nevertheless clear to the Yonkers community that Yonkers High School and Gorton High School are the two high schools in which the vast majority of the city's minority students are enrolled. Yonkers High School receives students from the School 10, 18, 19 and King elementary school zones; Gorton receives students from the School 6, 25 and King zones and was considered a school marked by racial disturbances and minority identifiability even prior to achieving its predominantly (*i.e.*, over 50%) minority status in 1982. Tr. 5505-06 (Minervini); *see* SCHOOLS IV.F.2 *infra*. In sum, community and school administration perceptions are consistent with the

other indicia of racial segregation which exist in the Yonkers public school system.

In order to properly evaluate many of the acts and omissions of the Board with respect to student assignment policies and other enrollment-related practices, it will be necessary to refer to numerical evidence of school capacity. The available capacity data for presently operating and previously closed public schools are summarized in Appendix E to this Opinion. As these figures reflect, significant variations among the particular sources of capacity data are generally the exception rather than the rule. In analyzing the feasibility of particular courses of action, we will note these variations (for example, by giving a range of capacity figures and the source of these figures) to the extent applicable.

The Yonkers public school system has undergone many grade reorganizations throughout its history, particularly in recent years. Originally organized in a K-8, 9-12 fashion, the district gradually moved toward a more typical elementary-middle (or junior high[85]) -high school structure subsequent to the creation of eight middle school attendance zones in 1938. Some facilities, such as Schools 16, 25 and 27 in West Yonkers and Schools 4, 5, 8, 11, 14, 15 and 17 in East Yonkers, continued to serve both elementary and middle school students until the 1950's and early 1960's, when additional middle schools such as Lincoln, Gorton and Whitman were constructed and expanded. By 1967-68, the district was organized primarily in a K-6, 7-9, 10-12 pattern.

Since 1967, the district's grade structure has undergone considerable change. The opening of King Intermediate School in 1969 brought about the district's first 4-6 school, and with it a number of K-3 feeder schools. By 1972, the K-5 elementary school was introduced and eventually became the district's most common grade structure when the Board adopted Superintendent Robert Alioto's 1973 school reorganization recommendations.

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[85]Middle schools include grades 6-8; junior high schools include grades 7-9.

The stated reasons for recommending implementation of a K-5, 6-8, 9-12 grade structure were the fewer discipline problems and increased opportunities for educational innovation and individualized instruction at the elementary school level, and the closer intellectual, physical, psychological and social resemblance between sixth and seventh graders than between fifth and sixth graders. Before this pattern became even nearly uniform, however, the city's fiscal crisis and change in superintendents led to a reformulation of grade structure. As part of the 1977 Phase II school reorganization proposal, Superintendent Joseph Robitaille and his staff recommended the adoption of a K-6, 7-8, 9-12 grade structure. This recommendation was based on a variety of factors: more efficient space utilization; increased teacher and parent involvement; the fiscal savings of providing education to sixth graders in elementary, rather than middle, schools; and the emotional, physical, psychological and educational features of eleven-year olds. This proposal was adopted in 1978 and was fully implemented at the elementary school level by 1980 and at the secondary school level by 1981.[86]

IV. THE BOARD OF EDUCATION

A. School Openings, Closings, and Attendance Zone Changes

1. Introduction

The Yonkers school district has witnessed a substantial number of school openings, school closings, and attendance zone changes during the past forty years. While each of these decisions raises its own particular issues and has had a separate racial impact, they are all similar in their more geographically limited, rather than systemwide, effect. In general, the Board's practices in

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[86]In 1984, the school district converted seven Northeast Yonkers elementary schools into K-8 facilities following the closing of Whitman Middle School for purposes of asbestos removal. Tr. 11,598 (Guerney).

these areas can be examined individually to determine the existence of segregative impact and segregative intent. Nevertheless, decisions regarding the opening or closing of a particular school have generally been accompanied by related adjustments in attendance zones or student assignments. Our discussion of Board practices will reflect this interconnection.

A summary of school openings, closings, and attendance zone changes is set forth below.

ELEMENTARY SCHOOLS

School	Quadrant	Opening Date	Closing Date	Attendance Zone Changes Since 1950
1	NW	1872	1954	—
2	SW	1891	1945[a]	—
3	SW	1884	1976	1965, 1972, 1975
4	SE	1885	1976	1963, 1965
5	Central	1884	—	1954, 1963, 1976
6	SW	1889	—	1953, 1966, 1973
7	SW	1887	1976	1963
8	NE	1892	—	1951, 1952, 1954, 1973
9	SW	1894	—	1963, 1965, 1970, 1976
10	SW	1972	—	—
11 [b]	SE	1898	—	1965, 1976
12	SW	1898	1976	1953, 1963, 1973
13	SW	1901	—	1973, 1976
14	SE	1902	—	1952, 1976
15	NE	1902	1976	1951
16	NW	1902	—	1953, 1963, 1964, 1968, 1970, 1976
17	SE	1903	—	1952, 1963, 1973, 1976
18	SW	1904	—	1973, 1976

(Footnotes on following page)

School	Quadrant	Opening Date	Closing Date	Attendance Zone Changes Since 1950
19	SW	1906	—	1965, 1972, 1975, 1976
20	SW	1907	1930[c]	—
21	SE	1914	—	1963, 1976
22	NW	1914	—	1963
23	SW	1918	—	1973, 1976
24	NW	1930	1976	1954, 1963
25	NW	1930	—	1953, 1963, 1964, 1968, 1973
26	NE	1936	—	1976
27	SW	1930	—	1976
28	NE	1951	—	1976
29	NE	1951	—	1958
30	SE	1952	—	1963, 1973
31	NE	1953	1982[d]	1976
32	NE	1958	—	—
King	SW	1969	—	1973, 1976
34 [e]	NW	1963	—	—

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[a]Converted into Franklin Junior High School.

[b]Part of Twain facility.

[c]Converted into Longfellow Junior High School.

[d]Converted into elementary magnet school.

[e]Part of Emerson facility.

MIDDLE AND JUNIOR HIGH SCHOOLS

School	Quadrant	Opening Date	Closing Date	Attendance Zone Changes Since 1953
Burroughs	Central	1969	1978[f]	1973, 1976
Commerce	SW	1973[g]	1976	—
Emerson	NW	1963	—	1973, 1976, 1978
Franklin/ Fermi	SW	1926, 1945[h], 1974[i]	—	1954, 1958, 1963, 1973, 1976
Gorton	NW	1954	1973	1963, 1969
Hawthorne	SW	1925	—	1958, 1963, 1969, 1973, 1976
Lincoln	SE	1953	1972	1963, 1969
Longfellow	SW	1930[j]	—	1954, 1963, 1969, 1973, 1976
Roosevelt	NE	1954	1959	—
Twain	SE	1925, 1971[k]	—	1953, 1963, 1973
Whitman	NE	1959	—	1963, 1969, 1978

HIGH SCHOOLS

School	Quadrant	Opening Date	Closing Date	Attendance Zone Changes Since 1953
Commerce	SW	1930[j]	1974	—
Gorton	NW	1923	—	1963, 1973
Lincoln	SE	1957	—	1963, 1973
Roosevelt	NE	1926	—	1963, 1973
Saunders	SW	1911, 1980[f]	—	—
Yonkers	SW	1927, 1945[h], 1974[i]	—	1957, 1963, 1973

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[f]Represents closing of Saunders Trades and Technical High School facility and relocation of Saunders to Burroughs facility.

[g]Represents relocation of Gorton Junior High School students to Commerce facility.

[h]Represents relocation of Franklin Junior High School students to School 2 facility and relocation of Yonkers High School students to Franklin facility.

[i]Represents opening of new Yonkers High School, relocation of Franklin Junior High School students to old Yonkers High School facility, and renaming of Franklin Junior High School as Fermi Middle School.

[j]Represents opening of High School of Commerce and relocation of Longfellow Junior High School to School 20 facility.

[k]Represents opening of new Twain Junior High School facility.

As the above tables indicate, prior to 1940 the school district had constructed twenty-five elementary and seven secondary schools. In 1940, the City's minority population was 3.3%, with most minority students residing in the School 1, 6, and 18 attendance zone areas. In addition, subsidized housing had just begun to be developed in Southwest Yonkers; the concentration of minorities in that area was the result of pre-existing demographic patterns. Beginning in 1950, after a fourteen-year hiatus in school construction, the district opened a number of new elementary and secondary schools primarily in response to the continued increase in population density in the northeastern portion of Yonkers. SB 848. This school construction was also consistent with a 1934 Columbia University study of the Yonkers School District which predicted increased population growth in East Yonkers and recommended that school construction plans be formulated accordingly. SB 10, at 210, 242-43, 248, 256. Elementary Schools 28, 29, 31 and 32 were built between 1950 and 1957 in Northeast Yonkers, an area which experienced a 64% increase in population density during this time. GX 40, at 20. Similar school construction occurred on the secondary school level as well: Lincoln and Whitman Middle Schools were opened to serve the Northeast and Southeast Yonkers communities, and Emerson Elementary/Junior High School was opened in 1963 in response to similar population increases in Northwest Yonkers. In 1954, Gorton and Roosevelt High Schools expanded to include middle

school students, and in 1957 Lincoln Middle School began to enroll high school students previously attending Yonkers High School.

By 1963, the school district had constructed and opened the vast majority of its public schools. By this time, the concentration of minorities in Southwest Yonkers had increased, including significantly minority populations in the attendance zones for School 7 (23% minority in 1961), 18 (23% minority) and 19 (32% minority). *Cf.* GX 56 (10% elementary school districtwide average in 1961). While privately-induced segregated housing patterns had continued during this time, the City's segregative involvement in the site selection and construction of subsidized housing was not at the open and notorious level of later years, nor is there evidence establishing a direct relationship at that time between the Board's and City's activities. In short, the record suggests that the Board's school construction decisions prior to the mid-1960's were neither intentionally segregative viewing them in isolation, nor a deliberate incorporation or enhancement or publicly or privately created residential segregation in the City.

As a result of the district's construction of new school facilities, the attendance zone boundaries for existing schools began to shrink. On the elementary school level, attendance zones for Northeast and Central East Yonkers elementary schools became smaller as five new elementary schools were opened. The 1963 opening of Emerson Elementary School caused a similar contraction of the neighboring School 16 zone. On the middle school level, this phenomenon did not arise until the 1960's, when the opening of Emerson and Burroughs Junior High Schools in 1963 and 1969, respectively, resulted in the contraction of the disproportionately minority Gorton and Longfellow zones as well as smaller reductions of the Franklin, Lincoln and Whitman zones. The 1957 opening of Lincoln High School halved the attendance zone for the disproportionately minority Yonkers High

School in Southwest Yonkers, which rose from an estimated 14% to an estimated 22% minority enrollment.

The effects of this gradual contraction of school zones was accompanied by the first signs of community isolationism or separation with respect to the public schools. As the Northeast Yonkers community population expanded in the 1950's, residents bordering on the relatively well-to-do Scarsdale and Bronxville communities became identified with these non-Yonkers communities, while the Southwest Yonkers minority population slowly but steadily began to grow. The "sectional preoccupation" with respect to schools, recognized in a 1957 New York State Education Department survey of the Yonkers school system, GX 40, at 23, was consistent with community opposition to the development of subsidized housing in the East Yonkers area. *See* HOUSING III.E *supra*.

The period between 1950 and 1965 was also marked by a number of physical additions to existing school facilities. GX 644. On the elementary school level, the most significant of these additions, most of which were made to provide additional classroom space, were expansions of Schools 13 and 27 in Southwest Yonkers, and Schools 28, 29, 30, 31 and 32 in Northeast and Central East Yonkers. School 13, originally a twelve-classroom facility, added eleven classrooms in 1967 and an additional ten rooms in 1969, at a time when its minority enrollment was 5%. In 1960, School 27, at the time an approximately 2% minority school, added fifteen classrooms to its previous four-room capacity. GX 56. Additions to East Yonkers schools occurred primarily between 1955 and 1965, a pattern consistent with the population influx of those years. SB 849. On the secondary school level, the most significant additions were an expansion of Hawthorne Middle School, which encompassed the School 13 and 27 attendance zones, and Roosevelt High School, which included the School 29, 31 and 32 zones and part of the School 30 zone.

Since the mid-1960's up to the filing of this action, the district has constructed, or otherwise opened in existing facilities, six schools: School 10 and King Elementary Schools, Burroughs, Commerce and the new Twain Junior High Schools, and the new Yonkers High School. The district has also closed nine schools: six elementary schools (3,4,7,12,15,24), two middle schools (Burroughs, Commerce), and one vocational high school (Commerce). (This excludes the closing of four school facilities — Franklin and Gorton Junior High Schools, Yonkers High School, and Saunders Trades and Technical High School — and relocation of their student bodies to other facilities bearing the same or new name.)

We note at the outset that since 1970, the Board's school openings and closings have been primarily segregative in effect. The district's two newest elementary schools both opened as racially identifiable, predominantly minority facilities — School 10 (73%) and King (57%). The two newest secondary schools also opened as predominantly or disproportionately minority schools — Commerce Middle School (53%) and the new Yonkers High School (34%) in 1973 (versus 16% districtwide high school average), increasing to 57% by 1975). Of the nine schools closed since 1970, three of them were among the district's most racially balanced schools — the High School of Commerce (19%), School 24 (19%), and Burroughs Middle School (19%).[87] Two closings — Schools 4 and 15 — simply resulted in the transfer of virtually all-white student bodies to virtually all-white schools. Only the School 12 and Commerce Middle School closings constituted attempts to eliminate heavily racially isolated minority schools, and only the Commerce closing resulted in

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[87]In 1982, the Board closed a tenth school, School 31, which at the time was a 21% minority school. The Board converted the School 31 facility into a districtwide enrichment center for gifted and talented elementary school students.

significantly desegregative student reassignments to predominantly white schools.

The Board has redrawn attendance zone boundaries many times during the course of the past fifty years. These changes, which have generally been formulated initially by the district's administrative staff and then approved by the Board, have been implemented for a wide variety of reasons. Several of these changes have had little or no racial implications either in their effect or their intent and thus will not be discussed further in our findings. Others have been made as part of more significant school reorganization decisions, such as school openings or closings. Only in a few instances has a series of attendance zone changes occurred which were unrelated to any school opening or closing decision — changes involving Schools 16 and 25 in Northwest Yonkers, and changes involving Schools 6, 9 and 12 in Southwest Yonkers. Nevertheless, in order to properly evaluate the school opening, closing and related attendance zone changes which have occurred, some introductory remarks are in order.

Both plaintiffs and the Board have submitted maps reflecting attendance zone boundaries for Yonkers public schools. GX 1,3,5,7,9,11,13,15,17,19,21,23,25,27,29,31,33,35,37; SB 626-628. These maps reflect attendance zones for the elementary and middle school levels since 1938, and high school attendance zones since 1954, the years in which these attendance zones were formally established.

Attendance zone boundaries were first established prior to the presence of significant numbers of minorities in Yonkers. As the minority population of Southwest Yonkers and the white population of East Yonkers have grown, attendance zones have been altered to reflect these demographic changes. In general, students are assigned to the school in the geographic attendance zone or district in which they live. This "neighborhood school policy" applies for elementary, middle and academic high school students; it has not and does not apply for the district's vocational-

technical schools, which have enrolled students from throughout the city and have had no attendance zone boundaries. Although adherence to this policy has generally been consistent on the elementary school level, with minor variations between contiguous school zones in the same geographic quadrant of Yonkers, the testimony of Board members and other school officials reflects that the neighborhood school assignment policy is considerably more flexible on the middle school and high school level. Fareri Dep. 208; Hicks Dep. 195-97; Lester Dep. 79; Weiner Dep. 144, 282; TR. 11,582 (Guerney).

Since the 1930's, the Yonkers School District has not generally provided subsidized transportation for students between home and school. The district does provide such transportation, in the form of contracted van or bus service or public transportation subsidies, for Special Education students (for whom transportation must be provided under state law; *see* N.Y. Educ. Law § 2554(18) (McKinney 1981))[88] and for students attending special enrichment programs at schools outside their home attendance zone. GX 877. In addition, a number of students travel to school by using either public bus transportation or by obtaining privately-contracted bus transportation services. Most of these students are of either junior high or senior high school age: students attending Twain, Whitman and Emerson Middle Schools and all of the city's high schools have at various times used bus transportation to attend school. Similar transportation exists at the elementary school level for a small number of the district's twenty-five elementary schools; specifically, Schools 26, 31 and 32 in Northeast Yonkers, and School 22 in Northwest Yonkers. Gold-Marks Dep. 18; Tr. 5330-31 (Frauenfelder); Tr. 11,241 (Guerney). Prior to the filing of this lawsuit, the Yonkers PTA was responsible for obtaining and coordinating the use of privately-contracted bus transportation. Tr. 5328-29 (Frauenfelder).

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[88]In 1980-81, there were 1,249 students enrolled in Special Education programs, comprising 6% of the district's total public school enrollment.

There are several exceptions to the district's general attendance zone student assignment policy. First, Special Education students have, to varying degrees throughout the school district's history, been assigned to schools outside the district in which these students reside. *See* SCHOOLS IV.D *infra*. Second, the Board at various times has created options for students to attend a choice of particular schools. The most notable options have been (1) an option created in 1978 for former Burroughs Middle School students living in the old School 24 zone to attend either Whitman or Emerson Middle School; *see* SCHOOLS IV.F.3 *infra;* (2) a policy allowing Japanese-American students living in the School 25 zone to attend School 16; *see* SCHOOLS IV.A.4.a *infra;* and (3) a policy of allowing students to attend School 10 out-of-district and allowing students living in the School 10 zone to attend School 19; Tr. 13,013-14 (Dodson); Frank Dep. 279-80.

Third, students may apply on an individual basis for an out-of-district transfer from their assigned school zone to a school in another area of the district. Since 1971, the district has employed written guidelines which school officials use to determine whether such transfers should be granted. Transfer requests are evaluated on a case-by-case basis and are generally granted for educational, psychological, physical or medical reasons, or based on "extenuating circumstances." In addition, transfers are routinely granted to any student who moves out of a school attendance zone prior to the student's last year in the school; thus, sixth, ninth and twelfth graders are permitted to stay in the school of their former residence for their last year in the school.[89] The out-of-district transfer process is flexible enough to allow for transfers not falling within any particular category, and has in one or two instances either been applied in a manner which would appear to exceed even the broad categories noted above, or has simply been circumvented. Batista Dep. 61-62 (transfer of Councilmember's

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[89]For an example of a segregative departure from this "last grade" policy, *see* SCHOOLS IV.F.2 *infra* (Homefield redistricting).

child from Gorton to Roosevelt); Hicks Dep. 20-27 (transfer of black Board member's child from predominantly minority school to integrated, educationally superior school). On the record before us, however, these instances appear to constitute segregative aberrations rather than indicia of any consistent or well-established pattern of improper, racially segregative student transfers. *Cf. Arthur* v. *Nyquist, supra,* 415 F.Supp. at 936-39 (transfer policy allowed 2,000-4,000 white students to attend out-of-district schools, many involving transfers from predominantly black to predominantly white schools); *Berry* v. *Benton Harbor, supra,* 442 F.Supp. at 1312-13.

The Board's effort to demonstrate the absence of a pattern of segregative school openings, closings and attendance zone boundary changes consisted of the testimony and mathematical analysis of Dr. David Armor. Dr. Armor, a sociologist with expertise in statistical analysis, prepared a change-by-change analysis of each school boundary change beginning in 1951 for elementary schools, 1953 for middle schools, and 1957 for high schools. *See* SB 810.6-810.8.

For years prior to 1967-68, the school year in which school enrollment data by race first became available, Dr. Armor essentially reconstructed school racial enrollments by analyzing census tract data at the census block level.[90] Using this data, he estimated the school age population within particular census blocks and then aggregated the number of school-age whites and minori-

[90]Two exceptions were made in this analysis to reflect the existence of actual racial student enrollment data. One exception is for elementary school boundary changes made from 1962 to 1965: these changes are based on actual enrollment data for the 1961-62 school year, at which time an actual count of student enrollment by race was made. Tr. 11,902 (Armor). A second exception is elementary school change # 15, a 1966 change whose racial effect is analyzed using 1967-68 actual racial student enrollment data. SB 810.6, at 5. Unless otherwise noted, the estimated school enrollments computed by Dr. Armor are relied upon elsewhere in these findings, with particular limitations or caveats noted where applicable.

ties living in the census blocks comprising particular attendance zones. For these years, Dr. Armor analyzed the numerical and racial impact of school boundary changes by comparing the estimated racial enrollments of the affected schools the year before the change with the anticipated enrollment after the change, a number derived by adding or subtracting the estimated number of students who were rezoned.[91]

For years beginning with 1967-68, Dr. Armor analyzed the boundary changes in two ways: first, by comparing the actual racial enrollment data of the affected schools in the year before the change with the expected school enrollment after the change, a number derived by adding or subtracting the estimated number of students rezoned. Dr. Armor also analyzed those post-1967 changes by comparing pre-change actual school enrollment to the *actual* school enrollment in the year subsequent to the change. The difference between the post-change expected enrollment and post-change actual enrollment consists of demographic changes occurring during the year of the boundary change, *i.e.*, shifts in the affected school zone's school age population, and differing birth rates among incoming and graduating classes at a particular school.

Dr. Armor analyzed the segregative or desegregative effect of school attendance zone boundary changes by using two mathematical indices. One, the dissimilarity ("D") index, measured the extent to which the affected schools in any given boundary change were rendered either more or less racially imbalanced relative to each other. The second, the exposure ("E") index, measured the extent to which the students attending the schools affected by a particular boundary change experienced more or less interracial contact, that is, exposure to members of another race, as a result of the change. While the manner in which these indices were

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[91]For years prior to 1967-68, minorities included Asians and Indian Americans, since census data prior to 1970 did not distinguish between different racial minority groups. Tr. 11,864-65, 11,947 (Armor).

actually calculated is somewhat more intricate than our brief description suggests, the basic concept can be illustrated by an example.

Assume for simplicity a school district with two elementary schools, School A, a 0% minority school with 100 students, and School B, a 50% minority school with fifty whites and fifty minorities. If the attendance zone boundary between these two schools were redrawn in such a manner that ten white students from School A were rezoned into School B's attendance zone, while ten minority students from School B were rezoned into School A's attendance zone, thus resulting in School A having 10% minorities and School B having 40% minorities, this boundary change would be desegregative under Dr. Armor's analysis: The D index would decrease, *i.e.*, show a desegregative effect, since Schools A and B would now be more racially balanced relative to each other (10% and 40% minority) than they were before the change (0% and 50% minority); the E index would also decrease since the minorities originally in School B would now be in contact with a greater number of the available white students attending the schools in question.

Using the D and E indices, Dr. Armor concluded that of the thirty elementary school boundary changes, four were significantly[92] segregative, ten were significantly desegregative, and fifteen had no significant effect one way or the other (the opening of School 10 in 1972 was found to have had a mixed effect according to the D index: the expected change was segregative, but the actual effect was desegregative). On the secondary school level, Dr. Armor concluded that of the nineteen middle school boundary changes, three were significantly segregative, four were significantly desegregative, and eleven had no significant effect in either direction (the opening of Commerce Middle School in

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[92]A segregative or desegregative effect was considered "significant" if the D or E index changed by five or more points as a result of the boundary change. Tr. 11,905 (Armor).

1973 was found to have had a mixed effect similar to the School 10 opening). As for the five high school boundary changes, Dr. Armor's analysis found that one was significantly segregative and four had no significant effect.

The difficulty which we have with Dr. Armor's analysis is not that it tells us too much, but that it fails to take into account a number of considerations which we consider relevant, indeed critical, to our analysis of both segregative effect and intent. The analysis, by limiting its scope to the specific schools directly involved in a particular boundary change, fails to consider the impact of particular changes on neighboring schools or on the districtwide racial balance. Whether or not the Board had any *obligation* to make boundary changes in a manner which increased districtwide racial balance, it is inaccurate and misleading to view boundary changes in isolation without consideration of the historical events preceding and reasons prompting a particular change; *see* SCHOOLS IV.A.3.a *infra* (School 1); the feasibility and relative desegregative effect of alternatives to the boundary changes actually made;[93] *see* SCHOOLS IV.F.2 *infra* (Commerce); SCHOOLS IV.A.3.c *infra* (Longfellow); the community's and school officials' perception of a particular change which, though mathematically desegregative with respect to the particular schools involved, further delineates a particular school, neighborhood or area of the city as identifiably white or minority; *see* SCHOOLS IV.A.2.b *infra* (School 10); SCHOOLS VI.F.2 *infra* (Commerce); and the effect of these perceptions on subsequent demographic patterns affecting both housing choices and school attendance decisions. The ability of a school board to both foresee and affirmatively alter the development of school racial enrollment patterns beyond the limited scope of any particular change renders a purely intraschool analysis of racial imbalance a

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[93]*See* Tr. 11,949 (Armor) (districtwide effect of boundary change inappropriate measure of racial impact "unless one was sort of free to bring other ones into the process").

somewhat unrealistic appraisal of the actual effects of boundary changes on the racial balance and identifiability of schools both directly and indirectly affected by a boundary change. A more searching inquiry into the Board's attendance zone changes is thus necessary in order to evaluate plaintiffs' claim that such changes were intentionally segregative.

We now turn to an analysis of specific school openings, closings and boundary changes in order to determine whether these actions may be characterized in whole or in part as intentionally segregative acts which furthered the segregation and racial identifiability of the Yonkers public schools.

2. School Openings

As we have already noted, the district has opened six schools over the fifteen years preceding the filing of this action. Three of these school openings and related attendance zone changes, involving two elementary schools (School 10 and King) and one middle school (Commerce) merit further discussion, for plaintiffs claim that these openings and related attendance zone changes represent intentionally segregative decisions by the Board and, with respect to School 10, the City, which further identified Southwest Yonkers schools as predominantly minority facilities.

a. Martin Luther King, Jr. Elementary School

King Elementary School is a virtually all-black school located several blocks north of Getty Square in Southwest Yonkers. Although King has operated as a virtually all-black school throughout the mid to late 1970's, the opening of King was designed as one of the first intentionally integrative efforts of the Yonkers School District. Several factors are relevant in examining the reasons for the Board's unsuccessful efforts to effectuate school desegregation at King and its surrounding schools: the circumstances underlying the planning and construction of an additional school in the Southwest Yonkers area, the site selected for the school, the circumstances surrounding the naming of the

school, the drawing and re-drawing of King's attendance zone boundaries, alterations in the school's grade organization, and the interrelationship of these events with the conditions in surrounding elementary schools.

The construction of King was originally based on the need to accommodate the increasing student enrollment at Schools 6 (78% minority in 1967-68) and School 12 (64% minority in 1967-68), two of the district's most racially imbalanced and overcrowded elementary schools. In order to properly understand the reasons for the segregated nature of Schools 6 and 12 and the need for an additional school in that area of the city, some background is in order.

The racial identifiability of School 6 has existed for virtually as long as the district's elementary school boundaries have been in existence. School 6 is located in an area of historically heavy minority concentration in Southwest Yonkers; its attendance zone embraces the Cottage Place Gardens housing project, whose estimated minority student population during the 1950's and 1960's was equal to or greater than School 6's minority enrollment. Tr. 11,883-84, 11,890 (Armor). By 1953, School 6 had an estimated minority enrollment of 29%, the second highest minority enrollment in the district. School 25, located directly north of School 6 along Warburton Avenue, was a comparatively whiter school, with an estimated 4% minority enrollment in 1953.

In 1948 and 1953, two changes were made to the attendance zone boundary between these two schools. In each instance, areas which had a lesser percentage of minority students than the School 6 zone as a whole were rezoned from School 6 to School 25. Although student enrollment data is not available for the 1948 change, School 6 had greater classroom capacity at the time. GX 644. By 1953, each school had added additional classroom space; prior to the 1953 boundary change, School 6, with eighteen classrooms, had an estimated 477 students, and School 25, with fifteen classrooms, had an estimated 409 students,

and was thus at least equal to School 6 in its percentage capacity enrollment.

The first boundary change was prompted by the district's previous exclusion of the children of two black families living near the School 6/25 border, at the same time that whites living in the School 6 zone, further south from School 25 than these black families, were permitted to attend School 25. Tr. 459-63, 502-12 (Smith). In response to complaints from black parents regarding the above student assignments, the district redrew the attendance zone boundary line dividing Schools 6 and 25 so as to include both white students previously attending School 25 out-of-district as well as the two black families noted above.[94]

The segregative effect of the 1953 boundary changes to School 6's attendance zone was also relatively limited. School 6's northern boundary was contracted southward, resulting in the reassignment of an estimated twenty-seven white and five minority students (16% minority) to School 25. At the same time, School 6's eastern boundary was extended to include an estimated twenty-two white and eight minority students (27% minority) from School 12. These two changes caused School 12 to decline, in slightly desegregative fashion, from 17% to 16% minority, while School 6's minority enrollment rose slightly from 29% to 30% minority. Thus, while the 1948 boundary change between Schools 6 and 25 may be fairly characterized as emanating from an attempt to temporarily maintain School 25 as a virtually all-white school, the numerical effect of these boundary changes suggests that they did relatively little to further establish either School 6 or School 25 as racially identifiable elementary schools.

From 1953 to 1969, School 6's attendance zone boundary lines remained unchanged, but the school became increasingly

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[94]The children of one of the black families actually attended School 25 prior to the boundary change because of parental insistence that their children be permitted to attend the school. Tr. 460-61, 506-07 (Smith).

imbalanced in its racial enrollment. From an estimated 30% minority in 1953, the school increased to 45% minority by 1961 and 78% by 1967. White student enrollment declined from 332 (estimated) to 126 students during this fourteen-year interval, while minority enrollment at the school increased from 143 (estimated) to 225 in 1961, then more than doubled over the next six years to 453 in 1967. By the mid to late 1960's, the rapidly increasing minority enrollment led to severe overcrowding at the school.

The attendance zone boundaries between Schools 9 and 12 also were altered a number of times during the 1960's. The attendance zone for School 9, located on Fairview Street in Central West Yonkers, is located just north of the zone for School 12, a substantially more minority-populated area which encompassed the Mulford Gardens and Schlobohm subsidized housing projects. Since 1938, the boundary line separating these two schools had been located along Loehr Place, thus dividing students from Mulford Gardens between the two schools. In 1963, the district redrew the boundary between Schools 9 (15% minority) and 12 (42% minority) in a northern direction. As a result, former School 9 students living in Mulford Gardens, an estimated 28% of whom were minorities, were reassigned to School 12. Although the percentage of white students involved in the change had a slightly desegregative effect on racially identifiable School 12 (at the time the second highest percentage minority elementary school in the district), the change also resulted in the reassignment of approximately 40% of School 9's minority student population to a significantly more racially imbalanced school. To the extent that school capacities may have been a relevant factor, the available evidence suggests that such a boundary change was inadvisable. School 9, with a capacity of approximately 560 (Phase II) to 605 (NYU Report) students, had 430 students prior to the change; the receiving School 12, with capacity for approximately 476 (Phase II) to 520 (NYU Report)

students, had 458 students, or almost full capacity, prior to the change.

In 1966, an estimated seventy-eight sixth grade students from School 6 (78% minority) were reassigned to School 9 (14% minority). This change was prompted by the increasingly severe overcrowding at School 6, a condition which necessitated not only the aforementioned reassignment but also the construction of additional classroom space in School 6. As a result of this reassignment of sixth grade students, School 9's minority enrollment (in absolute numbers) nearly doubled.

The overcrowding at Schools 6 and 12 led to a revision in the district's school construction plans. In 1965, the City Council adopted a school capital improvement program which provided for the construction of an elementary school on the Brandt Farm site in North Central Yonkers. Soon thereafter, however, school officials recognized that the rapidly increasing enrollments in Southwest Yonkers elementary schools and the overcrowding at Schools 6 and 12 necessitated the construction of an additional school in the Southwest Yonkers area. In April 1966, the Board changed the location of the school district's new elementary school to the Pitkin Park area on Locust Hill Avenue, virtually around the corner from School 6 and approximately four blocks from School 12. In doing so, the Board also decided to establish the new school as the school district's first intermediate (grades 4-6) school, relieving Schools 6 and 12 of their fourth, fifth, and sixth grade students. GX 434.

The site selected for the district's new school made racial integration a somewhat less than likely prospect. The site selected for the school was a heavily minority-populated area of Southwest Yonkers, approximately four blocks north of Getty Square, the downtown area of the city. In 1964 or 1965, Eugene Radko, then principal of School 6 and King's first principal, suggested to Superintendent Stanley Wynstra that the school be built at a location approximately one-quarter to one-third of a mile north of

the Pitkin Park area. Tr. 4453-55 (Radko). Although the site suggested by Radko was located in the attendance zone for School 9, an approximately 17% minority (1967-68) school, Radko's suggestion was not based on racial considerations but on the greater school-age population density in that more northern area. Tr. 4455.[95] This suggestion was not pursued further by Radko or Superintendent Wynstra, and the school was constructed at the Locust Hill Avenue site, located between Schools 6 and 12.

Although the school was located in a predominantly minority area of the city, the record suggests that this was done to relieve neighboring school facilities of their steadily increasing enrollments, and not as a deliberately segregative decision to isolate or identify King as a minority school. To the contrary, in 1968, the Board decided to add the fourth, fifth and sixth grade students from School 9 to the King feeder pattern, thus adding an integrative component to the already unique intermediate grade structure of the school.

The drawing of the original boundary lines for the King school was an issue of considerable dispute at trial. According to the proffered testimony of Rabbi Abraham Klausner, a leader of the Clergy of Yonkers' Education Committee who lived in the School 16 area, the Board originally planned to draw the King attendance zone so as to include a virtually all-white three-block area of the School 16 (0% minority in 1967-68) zone which, several years earlier, had been rezoned from the School 25 (41% minority in 1967-68) zone. *See* SCHOOLS IV.A.4.a *infra*. According to Klausner, the plan to include this so-called "dogleg" area of the School 16 zone in the King feeder pattern (by including it in School 9's attendance zone) was strongly opposed by residents of the School 16 area, who did not want to be

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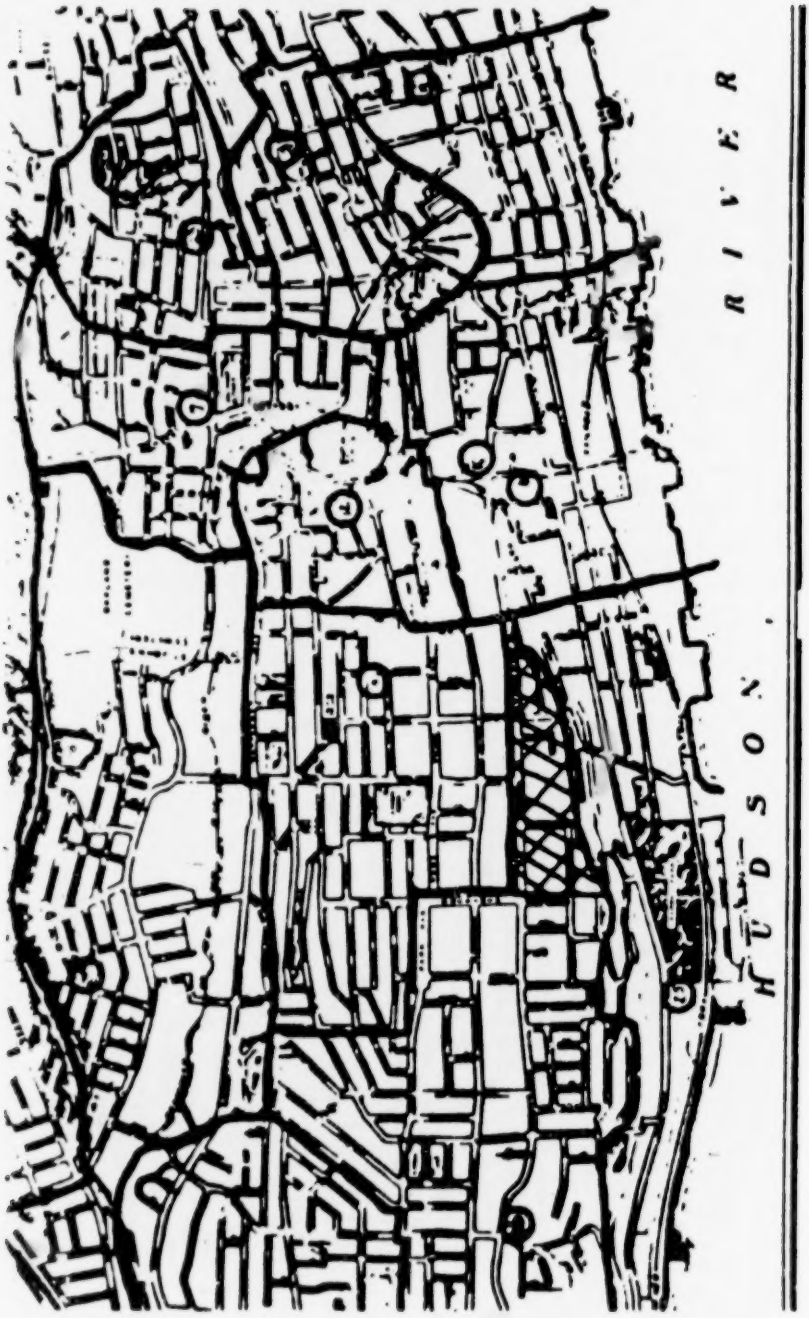
[95]No evidence was introduced regarding the feasibility of the site suggested by Radko.

reassigned from highly regarded (and identifiably white) School 16 to King, a school which was already being perceived by community members as an educationally inferior minority school. As a result, the Board allegedly reconsidered its more expansive King attendance zone proposal and excluded the northern portion of the School 16 dogleg area. Tr. 4526-32 (Klausner proffer). The attendance zone map below depicts the portions of the School 16 attendance zone to which the above discussion refers.

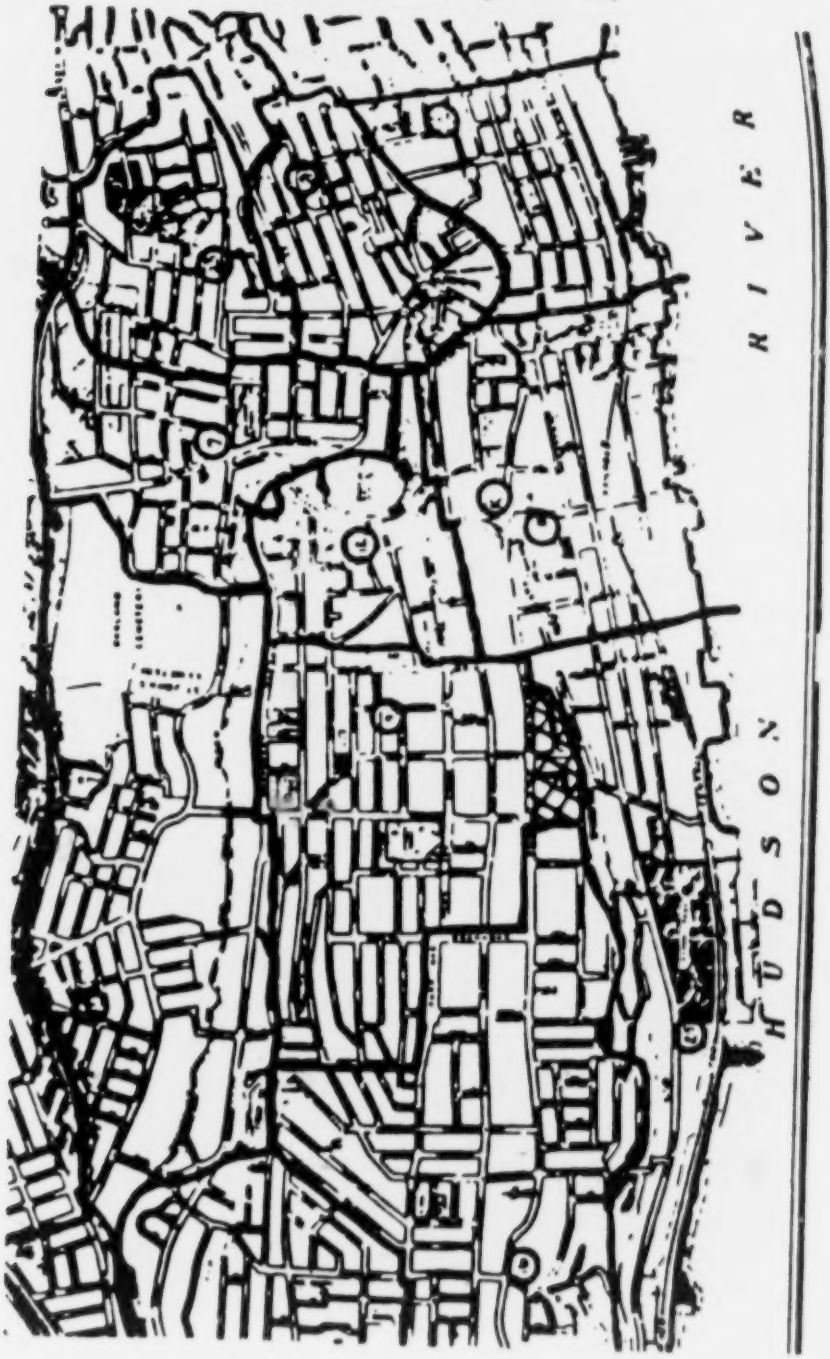
Elementary School District Lines, 1969

(cross-hatched area represents "dogleg" portion of School 16 zone)



Elementary School District Lines, 1970

(cross-hatched area represents portion of "dogleg" included in King feeder zone)



The record, however, weighs against a finding that such segregative conduct occurred. No evidence exists of the Board's consideration of such a plan; Board member Robert Jacobson was unaware of any such proposal being suggested by the administration or considered by the Board. Tr. 10,932-37. It is thus unclear whether the proposed northern boundary adverted to by Klausner was anything more than community hearsay or a preemptive response to an anticipated but yet-to-be introduced attendance zone proposal. In any event, objective evidence weighs against the feasibility of such a proposal: in 1969 King enrolled 701 students, or 93% capacity, and by the following year, was at 102% capacity. In addition, in 1970, after community members urged the school administration to consider including a portion of the School 16 dogleg area in the School 9 zone, the district in fact reassigned students from this area to School 9, which in turn fed into King and thereby raised King's white enrollment from 43% to 51%. The rezoned area included the area surrounding North Boradway and High Street, the same area which residents of the School 9 community had urged school officials to include in the King feeder zone. See Tr. 4480-81 (Radko). This action was taken and adhered to despite the administration's acknowledgement of the "potential explosiveness" of the King situation, GX 460, and despite the fact that including more white students in the School 9 zone left King at more than full capacity. It also was consistent with other evidence of the Board's contemporaneous interest in effectuating school desegregation in other areas of Southwest Yonkers. C-352; SCHOOLS IV.A.2.b *infra*. Thus, while there is evidence suggesting that School 16 community members had voiced opposition to the possibility, never implemented, of an even greater inclusion of School 16 students into the King feeder pattern, it is simply not reasonable to conclude that the original drawing and subsequent expansion of the King attendance zone was, in light of the aforementioned circumstances, segregative conduct by the Board.

Controversy surrounded the naming of the school as well. The school was originally referred to as School 33, in keeping with the district's historic practice of naming elementary schools by number. In February 1969, the Yonkers NAACP submitted a proposal to the Board that the school be named after the recently slain Martin Luther King, Jr. GX 441. School officials were originally reluctant to adopt this proposal for fear of identifying the school as a minority school and because of a disinclination to depart from the consistent practice of naming elementary schools by number. Tr. 4541 (Radko); Tr. 5048-49 (Jacobson). However, the district's alternate proposal to name a section of the school's library after Dr. King was strongly denounced by members of the black community, with Yonkers NAACP President Reverend Serenus Churn reportedly describing the proposal as an example of "latent racism in the Board of Education." GX 442, 443, 445. The Board reconsidered and voted to name the school after Dr. King, thus creating the first non-numbered elementary school in the district. GX 444. The Board's reversal on this issue was supported and applauded by community members. GX 446, 444.

Regardless of the subsequent racial segregation which occurred at King, the record establishes that the Board planned the opening of King with the hope that the school would serve as a significant step towards correcting racial imbalance in the Southwest Yonkers public schools. Testimony of school officials and various written communications with state education officials all reveal the integrative intent of the Board and administration in the opening of King. Tr. 4063, 4089 (Sobel); Tr. 5052 (Jacobson); Tr. 5203-04 (Morris) (re Superintendent Paul Mitchell); GX 452, 915. Whether this intent was predicated on an overly optimistic assumption about the ability to attract and maintain white students at the school, the record does not reveal an optimism so unrealistic so as to be regarded as insincere or pretextual. At the time of King's opening, nearly all the students who were reassigned to the school were introduced to a school

environment significantly more racially integrated than those of the schools they previously attended.

After the opening of King in 1969, however, the efforts to establish King as a racially balanced intermediate school began to disintegrate. The actual opening of the school itself detracted from the integrated image which the Board had sought to create. The school opened in April 1969 with students coming from predominantly minority Schools 6 and 12; School 9 students did not attend King until the following school year. Tr. 4466 (Radko). The addition of three black teachers to King's faculty raised the minority faculty percentage to more than two-and-a-half times the districtwide average. In May 1970 (one month prior to the end of the school year), Eugene Radko was reassigned to predominantly white School 9 (and eventually to School 11) and was replaced as principal by Nellie Rice, who is black. This reassignment, while motivated in part by Radko's outspoken behavior concerning the setting of the northern boundary of the King feeder zone, Tr. 4492-93, 4498-99 (Radko), was also prompted by philosophical disagreements between Radko and the central administrative staff over decentralization in school management, and by Rice's excellent reputation as principal for School 9. Tr. 4540 (Radko); Schainker Dep. 111.

The following year, the Board extended the School 9 zone westward in the manner described previously, decreasing King's minority enrollment from 57% to 49%. The protests of School 9 parents did not subside. In December 1970, a petition signed by 434 parents was submitted to school officials in which parents expressed concern over King's academic and discipline problems and urged the Board to restore the School 9 and 16 attendance zones to their pre-existing status. GX 453. The Board, however, did not alter the School 9 attendance zone boundary during that or the following (1971-72) year. Shortly thereafter, white students from the School 9 area began to withdraw from the King feeder pattern, apparently either relocating or enrolling in private

schools in the area: the number of white students at King dropped from 392 in 1970-71, to 224 in 1971-72, a 43% decline. (The grade 4-6 white student enrollment at the four non-public schools in the King feeder zones (Sacred Heart, St. Michael's, Halsted, and St. Joseph's) declined only 7% (583 to 542 students) during this same interval. SB 98). As the total enrollment at King declined from 767 students in 1970 to 746 students in 1971 and 652 students in 1972, the minority enrollment rose from 49% to 70% to 78%.

The first of two segregative attendance zone changes occurred in 1972, when School 9 was eliminated as a King feeder school. As a result, School 9 third graders continued to attend School 9 the following year. Of the approximately fifty-three or fifty-four students involved, thirty-two were white and the remainder minority. One year later, the racial identifiability of King increased when the district rescinded its plan to operate King as a grade 4-6 intermediate school and converted it to a K-5 elementary school. As a result of these two changes, King's minority enrollment increased from 70% to 87%.

The decision to remove School 9's fourth graders from the King feeder zone is traceable to the timetable set forth in the district's 1973 Reorganization Plan, in which Superintendent Alioto recommended that the district's schools be organized on a K-5, 6-8, 9-12 basis. Since under the plan School 9 was scheduled to reacquire fourth and fifth grade students in 1973-74 pursuant to its conversion to a K-5 elementary school, there was apparently little reason to assign School 9 fourth graders to King in 1972 only to have them reassigned back to School 9 the following year. Although the School 9 change was made months before the introduction of the 1973 Reorganization Plan, Alioto had previously expressed his interest, as early as 1971, in converting the district's grade structure to a K-5, 6-8, 9-12 pattern as soon as possible. Tr. 10,937-38 (Jacobson); Tr. 13,054-55 (Pitruzzello). Yet, other than the conversion of School 11 and Twain Middle

School into K-5 and 6-8 schools, respectively, King was the only school to be reorganized in this manner prior to implementation of the 1973 reorganization plan. Unlike School 9, Schools 6 and 12, both predominantly minority schools, continued to feed students into King in 1972-73.

Several factors, however, render a finding of segregative intent in these circumstances unwarranted. Numerical evidence suggests that such intent was not present: the fourth grade School 9 students were 41% minority, as compared with 70% King; the withdrawal of the School 9 fourth graders increased the percentage minority enrollment at King by approximately 3%, an increase which, as noted above, would have occurred in any event one year later. In addition, this reassignment, even though segregative, does not explain the district's simultaneous decision to retain fifth and sixth grades from the School 9 zone at King during the 1972-73 year, even though School 9 had well over 100 students under its recommended operating capacity and thus could have accommodated such a reassignment. In addition, documentary evidence concerning conditions at King in March 1972 suggests that the retention of incoming School 9 fourth grade students the following term was based on anticipated limits on King's enrollment capacity, projected increases in fourth grade enrollments, and class size. GX 455. Such a finding would also be inconsistent with both the district's refusal to comply with the community's earlier demands to restore the School 9 and 16 boundaries to their pre-King status, as well as the district's express rejection in 1974 of a Councilman's request that school officials rezone the dogleg area of School 9 into the virtually all-white School 16 zone in which this area had previously been included, a proposal which was rejected specifically because it would have decreased the white student population at 28% minority School 9. SB 214; Tr. 13,436 (Frank).

The 1973 Reorganization Plan's conversion of King from an intermediate to an elementary school completed the transforma-

tion of King from an integrated intermediate school to another of the many identifiably minority elementary schools in Southwest Yonkers. The conversion of King from a 4-6 to a K-5 school in 1973 was segregative both as to King and as to several surrounding schools as well. King's new attendance zone was created from sections of the School 6 (97% minority) and School 12 (86% minority) zones; the newly organized King elementary school opened as an 87% minority school. Although the change had a desegregative effect on School 9 (18% to 31% minority), it simultaneously increased the already-heavily minority enrollment percentages at three neighboring schools (6, 12, 25). This change was accompanied by a similar rise in minority faculty at the school, which by 1973 had a 42% minority staff. Both student and staff minority percentages increased throughout the 1970's, reaching levels of 98% and 37% (after a high of 53% in 1975-76), respectively, in 1980. This increase in King's minority enrollment was due primarily to the 1976 school closings, *see* SCHOOLS IV.A.3.b *infra*, and the conversion of the district's elementary schools from K-5 to K-6 facilities in 1980.

Despite the foreseeably segregative consequences of King's conversion, however, the evidence regarding the district's conversion of King to an additional K-5 elementary school does not support an inference of segregative intent. The elementary school grade reorganization recommended in Superintendent Alioto's 1973 Reorganization Plan was not a significant source of controversy, much less racial opposition, at the time and was in and of itself a rational educational objective which was supported by school officials and community members as well. Although the conversion of King to a K-5 elementary school was contrary to the Board's earlier desire to utilize King as a desegregative catalyst in an increasingly minority area of Southwest Yonkers, the history of King clearly demonstrates the interrelationship between the 4-6 grade configuration and the district's attempt to promote racial integration in the area to the extent possible. By 1973, King, a 78% minority school with a steadily declining white enrollment,

was realistically well past the point at which meaningful integration could be successfully achieved, absent measures far beyond any of the changes previously considered by the district. Although the Board failed to persist in its prior efforts to create an integrated school in the area, the major factors underlying the increased minority identifiability of King — the site selection, the naming of the school, and the white flight caused primarily by the district's intransigence with respect to the demands of the School 9 community for a segregative reassignment of its students — cannot reasonably be construed as evidence of segregative intent by the Board. In light of the previous integrative efforts at King and the other aforementioned circumstances inconsistent with inferences of segregative intent, we are unable to conclude that the 1973 conversion of King into a K-5 elementary school was part of a consistent pattern of segregative acts by the Board from which a finding of segregative intent may properly be made.

b. School 10

School 10, an elementary school, is located between the Riverview I and II subsidized housing projects on Riverdale and Hawthorne Avenues in Southwest Yonkers, between Getty Square and the Hudson River. The idea for the construction of School 10 originated from the Board's desire to replace the physically inadequate School 19, located three to four blocks south of School 10. P-I 51-34, at 11. This plan was part of a more comprehensive proposal to construct a new intermediate (grades 4-6) school in the southern part of the School 3 zone, drawing students from School 3 (34% minority in 1967), 19 (68% minority) and 27 (5% minority) and thus improving the racial balance of schools in the Southwest Yonkers area. During the late 1960's, the Board received $125,000 in capital improvement funds for the planning of this intermediate school. P-I 51-48, 51-49, 51-55, 51-58.

The Board originally considered locating the new School 10 in the city's second urban renewal area, several blocks south of its

present location, in order to relieve Schools 3 and 19 of their overcrowded conditions. Tr. 9335-36, 9406 (Curran). In the spring of 1967, Walter Webdale, Director of the Yonkers Urban Renewal Agency ("YURA"), met with Superintendent Wynstra and Deputy Superintendent Irving Goldberg and asked them to consider locating the school in the Riverview urban renewal area to the north, where the City was planning to construct several hundred units of subsidized housing. GX 284, 285; Webdale Dep. 201. The inclusion of the school in the City's urban renewal project was to serve as the City's statutory non-cash contribution for the Riverview urban renewal project, thus enabling the City to receive credit from the federal government towards its share of urban renewal expenditures and allowing the Board to construct a new school without a reduction in its capital improvement budget. In July 1967, the Board, in accordance with Webdale's proposal, passed a resolution requesting the City to provide a five acre site in the Riverview urban renewal area for the construction of a replacement school for School 19. GX 302. The five acre site size was in conformity with New York State Education Department standards and was communicated by Superintendent Wynstra to Webdale. GX 285; Tr. 4977 (Jacobson). The City Council also approved the proposal. C-711.

The construction of School 10 was designed as part of a self-contained neighborhood concept for the Riverview urban renewal area. With the City having made the decision (over the objections of Planning Director Philip Pistone) to make residential re-use of the City's second urban renewal area, the City began planning the construction of its new housing development. According to a March 1968 letter written by Webdale to HUD Assistant Regional Administrator for Urban Renewal Charles Horan, the school was to serve 400 families from the Riverview housing project, 540 families from Phillipse Towers (the predominantly white Mitchell-Lama middle income housing project located directly across from Riverview), and 100 families from a small area to the west of Riverview. GX 270. One year earlier, Phillipse

Towers residents had expressed to state officials their dissatisfaction with the deterioration in the neighborhood and with School 19, a school they described as "over-crowded, overburdened and dilapidated," and noted their impatience with the progress of the City's urban renewal program. GX 315. City and HUD officials hoped, however, that the construction of new housing and school facilities would result in the stabilization and rejuvenation of the then-deteriorated neighborhood. Tr. 1353-55 (Del Bello); Tr. 2267-68 (Yulish). The City hired architects to assist them in the design of the Riverview project, a design which had been developed elsewhere in the northeast area of the country. Tr. 1354-55 (Del Bello).

By 1968, YURA, led by Walter Webdale, became increasingly involved in the planning and construction of School 10. In his letter to HUD official Horan, Webdale urged HUD to approve the City's urban renewal funding application for Riverview, stating his belief that a majority of the Riverview residents would be "middle income young families." GX 270. During the remainder of that year, the original conception of the school underwent significant change. Communications from Webdale to various City and HUD officials, written between March and December of 1968, reflect that School 10 was now being planned as an additional K-3 primary school which would relieve School 19 of its overcrowding, and that School 19 would continue to enroll students from the area. GX 270, 288, 313, 314. The school's site was now specified as one acre for the school itself, with additional space for parking and outdoor recreational facilities. GX 286, 313. By the fall of 1968, Webdale began to press school officials to begin construction of the school by the following year in order to demonstrate to HUD officials the City's commitment to the urban renewal project. GX 286, 287, 314; Webdale Dep. 206-08.

In February 1969, the Board submitted preliminary site plans to Webdale. According to subsequent correspondence between City and school officials, these plans reflected the Board's under-

standing that the school would be located between Riverdale and Hawthorne Avenues, with a play area and fountains located between the school and Riverdale Avenue. GX 297, 300, 301. By January 1970, the Board's architect had finished the site plans for the school. These plans continued to provide for a school site, located between the two avenues, with a play area, trees, shrubs and fountains in front of the school but no other buildings separating the school's play area from Riverdale Avenue. GX 294-296; Tr. 4972, 4989 (Jacobson). At the same time, Webdale assured community members that the Riverview project would include adequate play space for the school. GX 291.

The plans of the Board's architect were consistent with the school district's planned development of the School 10 facility itself. The school was designed as the district's first "open school," a school without walls in which students would be taught in an unstructured and flexible interior environment by teachers with special training in the innovative open education instruction technique. The school's open interior was premised on the general openness of the school's surrounding environment. While the open school concept was an untested concept in the district, school officials were enthusiastic about the school and were optimistic that the attractiveness of the open school concept, along with the juxtaposition of the school to Phillipse Towers and the proposed income quotas for Riverview tenants which were communicated to the Board,[96] would result in a racially balanced student enrollment at the school. *See generally* Alioto Dep. 10; Tr. 4776-77 (Jamieson); Tr. 5108 (Jacobson); Tr. 5205-06 (Morris) (re Superintendent Mitchell); Tr. 9836-38 (Minervini); Tr. 11,406-08 (Guerney); Tr. 11,673-74 (Leahy).

By late 1969, Webdale continued to press forward with the City's efforts to commence construction of School 10. With the

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[96]The Board was told that the residents of Riverview would be 20% lower, 60% middle, and 20% upper income. Tr. 5107-08, 10,940-41 (Jacobson); *see also* Tr. 11,673 (Leahy).

application for federal funds for the City's Riverview urban renewal project still pending, Webdale asked Superintendent Mitchell to send HUD officials a letter, identical to the one which Webdale had written a year-and-a-half earlier, requesting that HUD approve its federal urban renewal funds grant application. GX 317, 381. In early 1970, Webdale communicated to City Manager Thomas Groux and City Councilmember Jesse Eisen that it was "extremely important" for the City Council to approve funding for the school's construction "at the earliest possible date" and urged the City Council to take steps to secure the abandonment of surrounding streets in the area so that construction could commence by the spring. GX 292, 293.

The remainder of 1970 was occupied by further planning of Riverview and the commencement of construction of School 10. During this period, the City's plans for the Riverview housing project were undergoing significant change. As of February, neither the type of redevelopment or redeveloper for Riverview, nor the income breakdown for the housing units, had been decided, with the UDC mentioned as a possible developer. According to YURA minutes dated February 13, 1970, the stated goals of the urban renewal program continued to be to provide relocation housing for urban renewal displacees and to "encourage an influx of new people into the area who have for years been leaving." GX 334, at 2. These minutes also reflect that the housing contemplated for the school would include 300 to 400 units and that construction of the school would commence in April. *Id.*

In March, the Board's site plans for School 10 were submitted to the City and YURA. GX 300, 301. By that time, the UDC had been named as developer of Riverview. P-I 150-112, 150-112A.

By April, City officials had tentatively agreed with the UDC to construct four housing projects in Southwest Yonkers for 1,400 units of housing, including 850 units at Riverview, in addition to

the contemporaneous development of several privately sponsored housing projects in that area. GX 1088.8. In July, a memorandum of understanding between the City and the UDC providing for 1,200 units of housing, including 800 units at Riverview, was approved by YURA and the City Council. As discussed previously, there was little public discussion or planning board consideration of these plans or the changes which had occurred. *See* HOUSING IV.C.2, IV.D.5 *supra*. School officials continued to plan to use School 10 as a means of relieving School 19 of its primary grade students, leading eventually to the closing of School 19 and the construction of a new intermediate school for Schools 3, 19 and 27. P-I 51-64 (June 1970 letter from Assistant Superintendent Gallagher to City Budget Director Casey).

At a January 1971 UDC Citizens Advisory Committee meeting, Riverview's architect discussed problems which had arisen concerning the design of the Riverview complex, particularly with respect to the location of School 10 in the center of the site and the resulting incompatability of the 400 Riverview Stage I housing units and the school's "necessary open space." GX 305. Proposed solutions included the construction of scaled or sloping apartment buildings, the conversion of the school's parking lot into a play area, and the construction of commercial units and a day care center, instead of apartments, on Riverdale Avenue. *Id.* In a March 1971 meeting, Webdale and City Manager Seymour Scher notified Board member Charles Curran and Acting Superintendent Gallagher of the change in plans for Riverview, including the reduced school site size and the erection of a seven-story apartment building and retail complex in front of the school on Riverdale Avenue. GX 297, 301.

Board members and school officials strongly and unanimously denounced the proposed change in plans; as Board member Jacobson described it, "the Board of Education, everyone, literally exploded." Tr. 4990; *see also* Tr. 9838 (Minervini). A number of alternative courses of action were considered by the

school district. The Board considered taking legal action against the City and the UDC and was advised by outside counsel that the Board would be justified in not accepting the proposed site based on YURA's alleged breach of contract. GX 300, SB 631. Board member Siragusa opposed opening the school in light of the revised plans, while Board member Curran requested that the City acquire the site originally sought by the Board in 1967. Tr. 5419-23, 9406-07. In October 1971,[97] Superintendent Alioto asked City Manager Scher to "forestall the arbitrary action" of YURA, the effect of which was described by Alioto as "cannabaliz[ing] the school site" and creating an "airshaft" school surrounded by apartment houses and devoid of adequate play space. GX 301; *see also* GX 303. Scher informed Alioto that the elimination of the planned play area in front of the school was a necessary cost saving measure, and that YURA had developed an alternate plan for the school site which included two play areas one in front of the school, and the other in the rear of the school in a space which had originally been slated for parking. Scher

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[97]The reason for the seven-month gap between the March 1971 meeting and the October 1971 letter from Superintendent Alioto to City Manager Scher is not clear. According to Alioto's letter, after Board representatives objected at the March 1971 meeting to the proposed revision in plans for School 10, "reconsideration was indicated" by YURA but "[n]o further advice was received" from YURA. According to Alioto, when the Board later approached Webdale about plans which the Board had heard about "through third parties" to build additional apartments along Riverdale Avenue, "they were advised that the land had been sold to developers." GX 301. According to Scher's letter in reply, after the March 1971 meeting the City and YURA waited for a "formal reply which would indicate either active support or disapproval of this plan. The Urban Renewal Agency upon receiving no notification proceeded to sell the land to the developer who is presently constructing on site." GX 297. According to Scher, construction work on the apartment building's foundation had commenced in October 1971. GX 299. The City's agreement-by-acquiescence explantion is hard to accept in these circumstances, given the strong objections voiced by school officials during the year, the clearly significant alteration in the school site which YURA had proposed, the previously close cooperation between YURA and the Board, and Webdale's repeatedly expressed desire to proceed expeditiously with the Riverview project.

suggested that the apartment building along Riverdale Avenue would act as a protective "barrier" between the School 10 students and the street. GX 297.

Superintendent Alioto remained unpersuaded and pursued the Board's protest with City and URA officials. In December, Alioto was informed by Scher that elimination of the proposed forty-one unit low and moderate income apartment building which was to be located in front of the school would be economically infeasible and would "financially prohibit" the entire Riverview Stage I urban renewal project, and would deprive the City of "critically needed" relocation housing. GX 299. Scher assured Alioto that plan revisions could be made to provide for 100 feet of partly covered open space in front of the school and that the proposed placement of the school and housing project "would provide an attractive open area, . . . suitably landscaped" and sufficient for recreational purposes. *Id.*

At a December 1971 meeting of school, City, and UDC officials, Webdale (by that time employed by the UDC) suggested that the commercial units previously planned for the ground floor along Riverdale Avenue would be removed to allow for fifty-five feet of open space along Riverdale Avenue in front of the school, and that additional space along Riverdale Avenue would be provided for in the development of the Riverview Stage II housing project. GX 298. By this time, with construction of School 10 nearing completion, the Board was essentially faced with the choice of rejecting the school site as revised, thereby jeopardizing the City's urban renewal funding and leaving students in the overcrowded and physically inferior School 19 facility, or accepting the partly constructed School 10 facility despite its substantial site limitations and relieving School 19 of its overcrowding. On December 16, Alioto notified Scher that the Board, while remaining "concerned with the intrusion of this structure in front of the school building, yet being aware of their overall civic responsibility and the impact of further delays to the

Urban Renewal Development," agreed to the proposed modification of the school site design. GX 306. As a result, construction continued along Riverdale Avenue, with the additional apartment building almost totally obscuring School 10 from view and eliminating the originally planned outdoor play area in front of the school. By April 1972, the Board had approved a proposal by the City's architect to eliminate the fifty-five foot open space in front of School 10 and instead construct a plexiglass enclosure along Riverdale Avenue for use as a recreation area for the school. GX 309, Tr. 4991 (Jacobson) Tr. 5420-23 (Siragusa). As a result, the school was barely visible from the street, with the sign identifying School 10 placed on the back of the school building, facing Hawthorne Avenue.

The effect of these modifications to School 10's site was clearly detrimental. Superintendent Alioto recalled that the erection of the additional housng units in front of the school undermined the school's potential for drawing students to the school. Alioto Dep. 10. Board members Jacobson and Siragusa also described the school site in distinctly negative terms, a perception shared by others in the community. Tr. 4992, 5420-22. A newspaper editorial decried the City's use of the land along Riverdale Avenue for additional apartments and described the result as creating a "new ghetto school." GX 303.

The school building itself, however, was still considered an educationally positive contribution to the school district, affording school officials the opportunity to test the open school education concept in Yonkers. Tr. 5002 (Jacobson); Tr. 9838 (Minervini). As the opening of School 10 approached, school officials eagerly prepared for the opening of the district's first open school: faculty members were given special instruction in the open school teaching method, and School 6 teachers implemented an instructional program for first graders modeled after the open school method. Tr. 4823 (Jamieson); Tr. 11,636-37 (Leahy); GX 476. A number of university and foreign educators visited the school, and the

1972 NYU Report observed that the facility presented the district with "an opportunity to conceive imaginative uses not normally afforded in existing facilities." GX 115, at 264; SB 183; Tr. 11,644-45 (Leahy).

The problems with the school's site size persisted subsequent to its opening in 1972. With the construction of Riverview I and II still ongoing around the school site, School 10 opened as a K-4 school with a 76% minority enrollment, drawing students from the bulk of School 19's former attendance zone. By that time, school officials also notified the URA and UDC that the school would be converted into a K-5 elementary school, a change which was in accordance with Superintendent Alioto's 1973 Reorganization Plan but which intensified the inadequacy of the school's already limited recreational facilities. GX 309; Tr. 11,643, 11,651 (Leahy). School officials had continued difficulty in securing adequate play space for School 10 students, with a conflict arising over the use of paved space in the rear of the school for parking rather than recreation. GX 307, 312, 322; Tr. 11,642 (Leahy). The district's ability to provide adequate play space also was limited by the steeply sloped nature of the space in the rear of the school, an area which Riverview's Program Manager suggested could be "imaginitively designed to provide an interesting play experience." GX 322. The glass-enclosed area along Riverdale Avenue was seldom used for recreational purposes in part because of the ongoing construction in front of the school, a condition which caused considerable inconvenience for School 10 students. Tr. 4784-85 (Jamieson); Tr. 4992, 4999-5000 (Jacobson); Tr. 11,643-44 (Leahy). The difficulties in securing recreational space persisted throughout the 1970's, with the two concrete spaces in front and back of the school continuing to serve as the school's only available outdoor play areas. The inadequacy of School 10's outdoor facilities was compounded by the structural limitations of the school itself, specifically, the building's low ceilings and lack of a gymnasium.

By 1973, a number of community groups and City officials expressed increasing concern over the construction of the additional 339 units of housing contemplated by the Riverview II urban renewal project. In a letter to the Governor of New York, the Yonkers Economic Development Corporation sought to delay construction of Riverview II, with the ultimate goal of adopting an alternative use for the site and relocating the project to a "lower density area in another part of Yonkers." GX 330. The organization specifically expressed its concern over the impact of the additional housing units on population density in the area, in light of both the physical inadequacies of the school site, Riverview's proximity to numerous other subsidized housing projects in the area, and the "[d]ifficulty in renting to maintain fair racial balance." *Id.* City Councilmembers Goodfriend and Goldman sponsored a resolution requesting a nine month delay in the construction of Riverview II in order to re-evaluate the use of the site and the impact of the additional housing units on School 10's facilities. GX 275. Mayor Del Bello expressed to Webdale, and mayoral candidate Angelo Martinelli was reported to have expressed, similar concern over the Riverview II project's expected impact on population density in the area and the project's physical obstruction of School 10. GX 328, 329.

Construction of Riverview II nevertheless proceeded as previously scheduled. By that time, City officials had expressed their disappointment with the Riverview project and implicitly acknowledged the predominance of housing-related objectives and desires with respect to the project. In a May 1974 letter to UDC Director Webdale requesting alterations in the design of the Riverview parking garage, CDA Acting Director Alphons Yost stated that

> Yonkers has been most cooperative with you and your organization in the Riverview Development and, in hindsight, some of our compromises may not have been in the best interest of the City. These compromises include the

> partial blocking of P.S. 10 along Riverdale Avenue, to allow for more units and the deletion of open space for garage use at the corner of Prospect Street and Hawthorne Avenue. Since, these compromises were in your best interest and not the City's, we trust you will give this request your full consideration.

GX 324.

In 1975, the construction of Riverview I and II was completed. The Riverview II building was located closer to Riverview I than had originally been planned in 1971. School 10 was (and is) almost completely obscured from view, with approximately thirty feet of space along Riverdale Avenue separating the Riverview I and II apartment buildings. GX 1005. In 1975, School 10 was 85% minority, the fourth highest minority enrollment in the District, and employed an increasingly disproportionate number of minority staff.

The circumstances surrounding the planning, construction and opening of School 10 had an impact on the district's other Southwest Yonkers elementary schools, particularly School 19. As recently as June 1970, school officials continued to plan towards the eventual closing of School 19 — a school with no gym, a small play area, and in need of extensive rehabilitation — and the construction of an intermediate school in the southern part of the urban renewal area to serve Schools 3, 19 and 27. P-I 51-64. By early 1972, plans to build a new intermediate school for the School 3/19/27 area had been abandoned. P-I 51-71. Thereafter, City planning officials suggested that School 19 undergo major rehabilitation rather than closing. GX 311. As a result, $250,000 in capital funds were allocated to the rehabilitation of School 19. P-I 51-87.

School officials, however, adhered to their original desire to close the school. In January 1974, in response to a request by Assistant Superintendent Anton Jungherr for input regarding the

planned rehabilitation of School 19, Assistant Director of Elementary Education Joseph Guerney recommended against incurring major expenditures to rehabilitate School 19 without at least implementing some redistricting of students in the area in order to improve school utilization. Guerney noted that School 10 was 400 to 500 students under full capacity; at that time, School 3 was still overcrowded and School 19 was underutilized. P-I 19-27; GX 64. In February, Assistant Director of Pupil Personnel Donald Batista informed Superintendent Alioto of a recommendation, agreed upon by school officials, to close School 19 at the end of the year and transfer its students to School 10, along with a recommended transfer of School 3 students to School 27, a 12% minority school with considerable available space. GX 507. By April, these school officials reiterated their agreement that School 19 should be closed, and school officials began to investigate the cost savings of closing the school. GX 961; P-I 19-30.

The proposed closing of School 19 generated considerable opposition from the School 19 community. School 19 parents were concerned primarily with the perceived inadequacies of School 10, including its lack of adequate recreational space, the larger class sizes which would result at School 10, and a dissatisfaction with the open education program at the school. GX 961; SB 198, 608; Tr. 4768 (Jamieson). In addition, although School 10 was well under full capacity at the time, Board members concluded that the large number of housing units nearing completion at Riverview would lead to increased enrollments at the school, thus inhibiting their ability to close School 19. Tr. 5424, 5466 (Siragusa); Tr. 5512-13 (Minervini). As a result of these considerations, the deteriorating School 19 facility remained open. The following year, the overcrowding at School 3 and underutilization at School 19 led to the reassignment of approximately ninety-five students (seventy-six minorities) from the northern part of School 3 (63% minority)'s attendance zone to

School 19 (82% minority). SB 615; Tr. 11,215-16 (Guerney).[98] One year later, School 3 was closed as part of the district's fiscally motivated school closings, and additional minority students were reassigned to School 19. *See* SCHOOLS IV.A.3.b *supra*. Thus, in two years, School 19's enrollment virtually doubled (275 to 547) as the district effectively abandoned its longstanding plans to close the school. By 1976, School 10 (85% minority) and School 19 (78% minority) were two of the most predominantly minority elementary schools in the district.

The evidence concerning the planning, construction and opening of School 10 clearly demonstrates the Board's subsidiary role in the decisionmaking process and the predominance of the City's residential objectives in the development of the Riverview project. Each critical decision with respect to School 10 was resolved by adherence to the City's independent concerns rather than the school district's educational goals, all of which had a distinctly negative impact on the district's efforts to develop an attractive and integrated "open school." The strong resistance with which the various alterations to School 10 were greeted by school officials and the practical infeasibility of alternative courses of action undermine any argument that the Board's reluctant acquiescence in the City's conduct concerning the development of School 10 reflects any meaningful degree of Board control over the development of the school.

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[98]The reassignment of School 3 students to School 19 rather than School 27, while segregative in its comparative impact, was based on School 19's underutilization rather than an attempt to limit minority enrollment at School 27. The suggested reassignment of School 3 students to School 27 involved a portion of the School 3 zone which was still largely white, and was made contemporaneously with the recommended rejection of another proposed School 3/27 redistricting based on the appearance of gerrymandering which the latter proposal created. GX 131. One year later, when School 3 was closed, the district rezoned, from School 3 to School 27, an area with substantially greater minority concentration than the predominantly white area which had been suggested for rezoning one year earlier.

Likewise, the evidence regarding the nature and extent of the Board's involvement in the decisions which contributed to School 10's racially segregated condition demonstrates that its actions were not designed to achieve this result. *Cf. Reed* v. *Rhodes, supra,* 607 F.2d at 728-30; *Berry* v. *Benton Harbor, supra,* 442 F.Supp. at 1298-99. The undermining of the open school concept at School 10 and the resulting racial consequences for elementary schools in the area instead resulted in significant part from decisions in which both the Board's role and educational objectives were secondary to those of the City. In light of the Board's original plans for the school and the circumstances surrounding its reluctant acquiescence in subsequent modifications to the school site, the foreseeably segregative impact of the Board's conduct on School 10's racial enrollment does not support an inference of segregative intent by the Board. We find that the plaintiffs have failed to demonstrate that the Board's site selection, planning, and opening of School 10 was motivated by segregative intent.

c. Commerce Middle School

The opening of Commerce Middle School was part of the Board's consideration of a series of school reorganization proposals prepared by the New York University School of Education. For a discussion of the Board's conduct with respect to Commerce Middle School, *see* SCHOOLS IV.F.2 *infra.*

3. School Closings

Until recently, school closings had been relatively rare in Yonkers. Between 1950 and 1973, School 1, in Runyon Heights, was the only school closed by the Board. In 1973, the High School of Commerce, one of the district's specialized occupational high schools, was closed pursuant to Superintendent Alioto's 1973 Reorganization Plan. The remainder of the school closings occurred as a result of the district's 1976 School Closing and 1977 Phase II reorganization plans. The 1976 school closings, prompted by the city's fiscal crisis, involved six elementary

schools (3,4,7,12,15,24) as well as the Commerce Middle School. The closing of Burroughs Middle School in 1978 was accompanied by the relocation of the Saunders Trades and Technical High School to the Burroughs facility, a course of action which was recommended as part of the Phase II plan, and the reassignment of Burroughs students to other middle schools in the district.

The closing of Burroughs and the High School of Commerce are significant primarily because of the other interrelated school organization changes which occurred contemporaneously. These changes are therefore discussed elsewhere in these findings. *See* SCHOOLS IV.F.2 *infra* (Commerce closing); SCHOOLS IV.F.3 *infra* (Burroughs closing). The remainder of the district's school closings — the closing of School 1 in 1954 and the 1976 school closings and related attendance zone changes —are discussed below. In addition, the Board's failure to close or implement attendance zone changes with respect to Longfellow Middle School is also discussed as part of our examination of school closings.

a. School 1

School 1, formerly the district's oldest elementary school, was located in the Runyon Heights area of Northwest Yonkers. Runyon Heights constitutes the only area of heavy minority population outside of the Southwest Yonkers area. The Runyon Heights area is bounded on the west by the Saw Mill River Parkway, on the south by Tuckahoe Road, on the east by the New York Thruway, and on the north by Curtis Road. Runyon Heights is also bounded on the north by a thin strip of land, owned by the Homefield Neighborhood Association, which effectively seals off the Runyon Heights minority community from the surrounding white neighborhood to the north. Tr. 2740-42 (Downes). To this day, Runyon Heights streets terminate in a dead-end just below this strip. In addition, the original deeds for many properties in the Homefield areas contained racially restrictive covenants

prohibiting the sale of such properties to non-whites. Tr. 2375 (Guzzo); Tr. 2733-35 (Downes).

Although attendance zone maps are not available for years prior to 1938, the testimony of several persons who attended School 1 during the 1930's established that students from outside the Runyon Heights area attended the school at one time. Specifically, students from the virtually all-white Homefield community, located north of Runyon Heights, as well as from largely white areas which were east, south and west of Runyon Heights, attended School 1. These white students rendered School 1 a racially integrated facility, with white students comprising roughly one-half to two-thirds of the student body, even though Runyon Heights itself was a predominantly minority community. *See generally* Tr. 2582-85 (Mareno); 2636 (Williams); 2672-74 (McRae); 2718-22 (Downes).

The 1938 attendance map reveals that the school district drew the School 1 attendance zone boundaries so as to track precisely the aforementioned strip of land to the north and the Saw Mill River Parkway to the west, thereby reassigning students from the Homefield community to virtually all-white School 22, a Northwest Yonkers school somewhat farther away from Homefield than School 1 and located on the other side of the Saw Mill River Parkway. In addition, the southern boundary of the School 1 zone was drawn along Tuckahoe Road, thereby reassigning white students previously attending School 1 to virtually all-white School 5. The resulting School 1 attendance area was the smallest in Yonkers, even though the School 1 facility subsequently suffered from severe underutilization problems which contributed to its eventual closing. Other neutral justifications, if any, for this particular drawing of the School 1 attendance zone boundaries are absent from the record. Based on the available evidence, the original drawing of School 1's attendance zone boundaries constituted deliberate, racially motivated gerryman-

dering, done in a manner which carefully incorporated privately created residential segregation.

The consequences of this attendance zone change were striking. School 1 quickly became a heavily minority school, reaching an estimated 91% minority in 1950, and an estimated 99% minority at the time of its closing in 1954. The facility was substantially underutilized; in 1950, it enrolled approximately 100 students while maintaining capacity for 240 (as of 1954). GX 2, at 3; SB 810.2. This underutilization resulted in double-grade sessions at the school, *i.e.*, the assignment of teachers to combined first and second, or third and fourth, grade classes. The first three black teachers hired by the Board were assigned to School 1, thus further identifying it as a minority school.

Simultaneously, all-white schools in areas surrounding the School 1 zone were suffering from increasing overcrowding. School 22 in particular was beset by overutilization problems; by 1950, plans were made to build additions to the facility to relieve this condition. GX 420. In 1950, School 22's enrollment was 314 students (all white), rising to 393 by 1954; its capacity was 390 (as of 1954). School 5, less than a mile south of Runyon Heights, enrolled 630 K-6 students (all white) in 1950 and 844 K-8 students by 1954; its capacity was 960 (as of 1954). GX 2. School 8, while considerably farther from Runyon Heights than Schools 22 or 5, was severely overcrowded. The school enrolled 878 students (two minorities) in 1950; the School 8 building, however, only had capacity for 690 students (as of 1954), a condition which necessitated the use of a basement annex in a nearby

housing development as classroom space. GX 423.[99] Elementary school maps indicate that particular areas in the attendance zones for each of these three schools (22,5,8) were closer to School 1 than to the school in whose attendance zone they were then included, a condition of which the Board was aware. SB 626; GX 423.

By 1953, efforts were made by School 1 community members to expand the School 1 zone in order to ameliorate the underutilization problem at the school and simultaneously relieve the overcrowding of neighboring schools as well — a suggestion which also would have had a clearly desegregative effect on School 1. Several members of the Runyon Heights community appeared before the Board in representative capacities, repeatedly urging the redistricting of School 1 to include those students previously eliminated from the School 1 zone. GX 423, 424. These efforts were consistent with the prevailing attitude of the Runyon Heights community, which favored redistricting rather than the then-apparent plans to close the school. Tr. 2610-12 (Mareno). The proposal was also clearly feasible from a capacity standpoint: at the time of its closing, School 1 had room for approximately 140 additional students, not including the potential for an even larger enrollment had the Board voted to build extensions to School 1 (as it had done with various other schools at or about that time).

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[99]The idea of assigning students from the School 8 zone to Runyon Heights' School 1 is not as radical as might first be imagined, despite the geographic distance between these two schools. The Grassy Sprain area in East Yonkers, for example, was approximately equidistant from Schools 1 and 8. Indeed, after School 24 was closed in 1976, students from Runyon Heights were assigned to School 31, which borders on the School 8 zone. This trip was considered by at least one Board member to be a safe route for students to travel "just down Tuckahoe Road." Tr. 9843 (Minervini). Significantly, in 1982 School 31 was converted into a specialized elementary school and the Runyon Heights area was rezoned into the School 8 attendance zone.

These efforts proved unavailing. In March 1954, two months before the decision of the United States Supreme Court in *Brown v. Board of Education*, the Board voted to close School 1. GX 428a; SB 32. The stated reasons for the Board's decision were non-racial, namely, the desire to "provide better education at less cost to the city," an apparent reference to the elimination of double-grade classes and the closing of the underutilized school. GX 425. The Board resolution also alluded to the age of the building, noting that School 1 was built in 1872, with additions built in 1900, 1917 and 1936. SB 32. Based on subsequent events, however, it is reasonable to conclude that the desire to dismantle the district's lone majority black school also animated the Board's decision. *See* Tr. 2611 (Mareno). School 1 students were reassigned to Schools 5 and 24, with a resulting desegregative effect on the latter schools. SB 810.6, at 2 (School 5 - 1% to 8% minority; School 24 -1% to 18% minority). When the decision was protested and legally challenged by black parents from the School 1 community, the New York State Commissioner of Education rejected the legal challenge, relying in part on a letter from the Yonkers NAACP stating that the Board's decision was "the most realistic solution to this long-standing problem." GX 427. Superintendent Wynstra thereafter wrote to the NAACP, thanking them for their role in "clarifying our intent and action" in closing School 1. SB 803; *see also* SB 754.

The Board argues that the NAACP's position on the School 1 closing demonstrates the propriety of the decision.[100] The NAACP's support of the Board's decision, however, must be viewed in context. Because the Board had consistently refused to consider and implement the alternative of redrawing attendance

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[100]In its Comments and Counter-Statements Regarding Proposed Findings of Fact by Plaintiff-Intervenors and Plaintiff, the Board goes even further, arguing that the State Commissioner's decision, based in part on the NAACP letter, is *res judicata* as to the instant claim of intentional segregation. In light of our conclusions regarding the Board's decision to close School 1, we need not resolve this contention.

zone lines in the Runyon Heights/Homefield area so as to maintain School 1 as an integrated facility, the NAACP as well as other groups and individuals who might have otherwise opposed the closing of School 1 were essentially faced with a Hobson's choice: support the closing of the Runyon Heights neighborhood school, even in light of the resulting burdens on black students, or oppose the closing and thus perpetuate what was at the time the only majority black school in Yonkers. Only after the Board rejected the repeated redistricting suggestions of the Runyon Heights community and decided instead to close Schoool 1 did the NAACP support the Board's decision as "the most realistic solution to this long-standing problem." Viewed in this light, the NAACP's eventual support of the Board's decision to close School 1 cannot immunize the decision from scrutiny.

At first blush, the Board's decision to close School 1 is troubling. While School 1 students were reassigned to schools within one mile of Runyon Heights, the redistricting proposed by the School 1 community would have involved no greater, and in certain instances, a lesser travel burden for Homefield or School 5 students, who at one time made the very trip to School 1 envisioned by the suggested redistricting. The redistricting proposal also would have eliminated the problematic double-grade classes at School 1 and presumably would have avoided the need for some of the additional classroom construction at School 22 one year later. The two double classes at School 24 could also have been easily eliminated by transferring students from a neighboring school zone, for example, portions of the attendance zone for School 16 (which, at 135% capacity, was so overcrowded that the district planned to erect partitions in study halls in order to accomodate its students) could have been transferred to the neighboring School 24 zone. The closing of School 1 also deprived the Runyon Heights community of its neighborhood school, a loss which was followed by a number of subsequent reassignments of Runyon Heights students during the 1970's. Moreover, the Board's decision preserved an all-white school

experience for Homefield students, consistent with the Board's deliberately segregative attendance zone boundary changes of prior years.

The Board's decision to close School 1, however, must be viewed in context. The decision to close the school, prior to *Brown*, resulted in the elimination of the district's only predominantly minority school and the desegregation of two virtually all-white schools. It also eliminated double-grade classes at all three schools, a result which would otherwise have involved considerable redistricting of other school zones. In addition, the reassignment of students to School 1 not only would have perpetuated the all-white character of Schools 5 and 24, but also would have done nothing to eliminate the all-white character of School 22. Since portions of both the School 22 and School 5 zones had previously been eliminated from School 1's attendance zone, it is difficult to find that the district's willingness to close School 1 and reassign its minority students to two virtually all-white schools, including School 5, was done to perpetuate racial imbalance at School 22. Finally, in terms of current segregative effect, the School 1 closing has increased racial balance at other elementary schools to which Runyon Heights students have been assigned — Schools 5 and 24, when School 1 was closed; East Yonkers' School 31, after School 24 was closed in 1976; and East Yonkers' School 8, after School 31 was converted into an elementary magnet school in 1982. While the reassignment of Runyon Heights students in 1954, 1976 and 1982 has resulted in travel burdens more significant than those imposed on practically any other community in Yonkers, we do not believe that such burdens, particularly when imposed in a desegregative spirit, were impermissibly discriminatory either in purpose or in effect. *See Parent Association of Andrew Jackson High School* v. *Ambach, supra,* 598 F.2d at 714 n.6 (inconvenience of transportation for minorities permissible as part of voluntary desegregation effort); *Higgins* v. *Board of Education of Grand Rapids,* 508 F.2d 779, 793 (6th Cir. 1974). Indeed, it is not unreasonable to infer that School 1, built in 1872

and thus twelve years older than any other elementary school in operation at the time of its closing, would have been a prime candidate for closing as part of the district's 1976 School Closing plan and thus would have resulted in substantially the same student reassignments as actually occurred. In sum, we conclude that the Board's decision to close School 1 and its subsequent reassignment of Runyon Heights elementary school students do not, in light of the aforementioned circumstances, constitute intentionally segregative or discriminatory acts and do not have current segregative effects on the district's elementary schools.

b. 1976 School Closings

By the mid-1970's, the racial segregation of Yonkers public schools was already quite pronounced. In 1970, seven Southwest Yonkers elementary schools (3,6,12,18,19,25,King) had disproportionately (45% to 85%) minority enrollments and enrolled 74% of the minority elementary school students in the district, while all of East Yonkers' elementary schools were at least 95% white. By 1975, twelve Southwest Yonkers schools (3,6,7,10,12,18, 19,25, King, Longfellow, Commerce, Yonkers High) had predominantly (over 50%) minority student enrollments, constituting 66% of the district's minority students; seventeen schools in East and Northwest Yonkers (8,11,14,15,16,17,21,22,28,29, 30,32,34, Emerson,Twain,Whitman,Lincoln) were at least 95% white. Similar racial imbalance was reflected in the school district's principal and teaching assignments as well; six of the seven black principals employed by the Board in 1975 worked in schools of at least 75% minority student enrollment.[101] At the same time, the demographic characteristics of Yonkers were undergoing similar segregative changes, including the City's addition of sixteen subsidized housing projects, all of them located in Southwest Yonkers.

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[101]The seventh principal worked at Yonkers High School, whose 57% minority enrollment was more than double the districtwide high school average of 27%.

The school integration policy of New York State education authorities also began to reflect considerably more flexibility in its approach to the question of school desegregation. As late as 1972, the state continued to adhere to its previously stated commitment to integrated education and its recognition of the inherent inequality of segregated schools. Recognizing the recently increasing "passions" surrounding the issue of busing, the Regents nevertheless deplored the "emotional misapprehensions" concerning the issue. The state concluded that

> [u]ntil residential and occupational integration becomes a reality in this nation — the ultimate sign that skin color has lost its evil fetish — the judicious and reasonable use of motor vehicles may be in many instances the only instrument available to enable local communities to meet constitutional requirements and educational goals.

GX 909.4

By 1974, however, the Regents stated that such transportation was appropriate where "demonstrably necessary to achieve integrated education" and that competing considerations of health and safety of children, particularly those of elementary school age, must also be recognized and respected. GX 909.5. In 1975, the state issued additional statements reaffirming and expanding upon its previous policies concerning transportation and integration. The Regents stated that, in its view, racial integration did not imply or require quantitative racial balance in all schools within a district but that serious efforts should nevertheless be made to bring about equal educational opportunity, including racial and ethnic integration. The Regents stated that "if a school district avails itself seriously and truly of available means to integrate its student population, then it should not be required to establish or maintain particular ratios of students from different ethnic origins." GX 909.6. One month later, the Regents expanded upon its previous statement. It noted the controversial nature of the use of

busing as a means of achieving racial integration in schools, stating that

> [w]e also understand that busing has become a source of serious argument not alone because some of its opponents may be illiberal, or racist, but also because many responsible people, black and white, do not regard the massive transportation of pupils out of their neighborhoods for purposes of achieving racial balance to be productive in the education of our children.

GX 909.7.

While it reaffirmed its commitment to the creation of integrated schools as an essential means of assuring equal opportunity for quality education, the Regents declared that such a goal was to be pursued by utilizing a number of methods, including, but not limited to, use of "judicious and reasonable transportation" of pupils. The Regents specifically noted that magnet schools, open enrollment or optional transfer plans, the closing of unneeded schools, and compensatory education programs were also appropriate methods of achieving this goal.

At the same time, the Board was confronted with increasing demands for desegregation of the Yonkers public schools. In response to written requests by the NAACP that the Board take immediate action to remedy the racial imbalance of the schools, GX 925.1, 925.5, the Board created, in October 1975, a Task Force for Quality Education ("Task Force") for the purpose of examining and proposing methods for alleviating the problem of minority isolation and insuring quality education for Yonkers public schools students. GX 925.7; P-I 59-9; Tr. 9858-59 (Minervini). The Task Force, comprised of members of community and religious organizations and other Yonkers citizens, set as its primary goal the issuance of a report containing findings regarding and recommended solutions to, the issues of quality education and racial imbalance. The implementation of a reme-

dial plan was tentatively scheduled to commence by September 1976.

The efforts of the Task Force, however, were quickly overshadowed. Instead, the 1975-76 school year was marked most prominently by the onset of the city's severe financial crisis. On November 13, 1975, a state of financial emergency in Yonkers was declared by New York State and an Emergency Financial Control Board ("EFCB") was established to oversee the fiscal affairs of the city and school district. In addition to implementing assorted city-imposed budgetary cutbacks totalling approximately $6 million for the 1975-76 school year, the Board was required by the EFCB to implement an additional $9.7 million in budget reductions (approximately half of the city's total budget deficit) by July 1, 1977. GX 777.

The mandated reduction of the school's budget was implemented in two stages: a $2.3 million reduction for 1975-76, and the remaining $7.4 million for 1976-77. These cutbacks were initiated in early 1976 by eliminating over 500 professional and non-professional staff positions in the district, including over 250 teaching positions. These cutbacks affected a wide array of educational programs, including the elimination of the district's pre-K program and the termination of fifteen reading teachers. In addition, the district eliminated over 100 school crossing guard positions, resulting in community protests and a number of accidents involving children walking to school. SB 838-844. In December 1976, the City Council passed a resolution requesting the Task Force to delay for six months the issuance of its final report. GX 141. The Task Force complied with this request.

The second stage of budget reductions took the form of a proposal to close seven schools and eliminate additional staff positions. As a result of these cutbacks, additional educational programs were curtailed or eliminated, including the More Effective Schools program at Schools 6 and 12, the Head Start

program, and the English-as-a-Second Language bilingual instruction program. GX 777, 780, 783, 787.

In March 1976, Superintendent Robitaille submitted to the Board a detailed proposal recommending the closing of six elementary schools (3,4,7,12,15,24) and one middle school (Commerce). These schools were chosen in accordance with a point system which was designed to weigh five factors — physical characteristics, special areas (*e.g.*,library, gym, cafeteria), internal characteristics (*e.g.*,class size and utilization), cost of operation, and population and enrollment (including racial balance) — in order to determine the most suitable schools for closing. The use of objective criteria was also designed to help the school administration to justify its decisions to close particular schools in anticipation of the strong community opposition which the proposal was likely to engender.

The decisions to close particular schools were in fact based on an evaluation of primarily race-neutral criteria. Most of the schools recommended for closing were severely underutilized, with several schools operating at roughly half capacity. Schools 3 and 4 were the oldest schools in the district, and, along with School 7, were in need of substantial renovation and rehabilitation. Most of the schools suffered from a variety of physical inadequacies, such as the lack of a cafeteria (School 12) or playground space (School 7). The closing of Commerce, the only middle school closed as part of the district's 1976 school closings, was also recommended primarily because of the substantial savings realizable from staff reductions and the school's severe underutilization and racial imbalance (77% minority, versus 28% districtwide middle school average). GX 567. In addition, an effort was made to close schools in such a manner as would allow for the reassignment of students to schools within walking distance from their homes; the Board lacked sufficient funds to provide transportation for reassigned students.

In March 1976, the Board held a series of public hearings on the administration's proposal. Not surprisingly, the anticipated resistance to particular school closings was quite forcefully expressed by community members. Similar opposition was also brought to the Board's attention in the form of numerous written protests and position papers from various community organizations and members. Opposition to the proposed closing of Schools 4 and 15, predominantly white (97% and 99%, respectively, in 1975-76) schools in East Yonkers, was particularly intense. This opposition was devoid of racial overtones; in fact, none of the contemplated reassignments of School 4 or School 15 students involved any significant degree of desegregation. Instead, the opposition to these school closings was based primarily on the loss of each community's neighborhood school and the resulting burdens involved in being reassigned to other surrounding schools in the East Yonkers area. Among the most frequently cited problems or burdens were traffic and parking difficulties at reassigned schools and safety concerns regarding children walking to their newly assigned school. Parents in the School 15 area were led by Mayor Angelo Martinelli in a group walk to demonstrate the travel burdens which would be imposed on School 15 students if the Board decided to close the school. The reassignment of School 4 students to Schools 14,17 and 21 was also opposed because of the community's assertion that students would have to travel longer, more hazardous walking routes; complaints were made about thirty to forty-five minute travel times over hazardous and hilly terrain. Opposition was also expressed regarding the configuration of neighboring school buildings and other facility-related concerns. *See* SB 574-578.

Southwest Yonkers community members also opposed the closing of their neighborhood elementary schools. This opposition was based in part on the overcrowding which community members claimed would result at neighboring schools (the closing of Schools 3,7 and 12 involved the reassignment of 1,193 students; the closing of Schools 4 and 15 entailed the reassignment of 601

students). Concerns were also expressed by the School 3 PTA regarding the racial consequences of the School 3 closing and the resulting white flight which it claimed would result if white School 3 students were reassigned to more heavily minority School 19; the PTA instead urged that School 19 be closed as the district had previously contemplated. GX 519. The Commerce PTA expressed concern that the closing of Commerce Middle School would dissipate the benefits of perceived educational improvements at the school, and asked that any redistricting of schools be done on an east-west basis in order to alleviate racial imbalance. GX 776.

Notwithstanding the community's opposition to the various school closings, on April 13, 1976 the Board approved the administration's school closing plan. GX 780. Community opposition, however, was by no means completely dissipated by the Board's decision. In particular, the strong community resistance to the two East Yonkers school closings intensified subsequent to the Board's approval of the administration's plan. Several Board members, including Anne Bocik, Robert Jacobson and Angelo Paradiso, were subjected to various forms of personal harassment (picketing and verbal threats) as a result of the Board's decision to close two East Yonkers elementary schools. Tr. 5066 (Jacobson); Tr. 5313-15 (Morris); SB 581. Mayor Martinelli commissioned a safety study for the purpose of demonstating the hazards of reassigning School 4 and 15 students to neighboring schools. Tr. 7635-44 (Martinelli). A sit-in was conducted at the Board of Education building in protest of the School 15 closing. Tr. 11,268 (Guerney). The School 15 community, with the help of Seelig Lester (appointed to the Board in November 1976), opened an alternative "freedom school" in the School 15 area rather than send their children to Schools 26 and 28. The Citizens Committee for Quality Education proposed the creation of a magnet program at School 15 in an attempt to secure its reopening. GX 941. Mayor Martinelli, in a written appeal to New York State Commissioner of Education Ewald Nyquist, expressed his belief that the Board's decision to close seven schools was arbitrary and

capricious and should be immediately reconsidered. GX 283. Martinelli and Lester also met with Nyquist to protest the closing of School 15. Tr. 7624 (Martinelli). Legal proceedings were instituted by parents of children formerly attending School 15 and were pursued all the way to the New York Court of Appeals in an unsuccessful effort to overturn the Board's decision. SB 272. Southwest Yonkers community members also voiced objections to the Board's decision and expressed concern that the Board might reconsider its closing of East Yonkers schools without similarly considering the reopening of Southwest Yonkers schools. SB 302. Notwithstanding this persistent and uniformly negative reaction to the Board's decision, the school closings were implemented, as recommended, beginning with the 1976-77 school year.

In numerical terms, the racial effects of the 1976 school closings and student reassignments may be summarized as follows:

SCHOOLS CLOSED

School	Geograph. Location	No. Students W	No. Students M	% Minority[a]
3	SW	178	369	67%
4	SE	317	7	2%
7	SW	135	206	60%
12	SW	10	295	97%
15	NE	275	2	0%
24	NW	205	50	20%
Commerce	SW	120	407	77%[b]

[a] The districtwide elementary school averge in 1975-76 was 30% minority.

[b] The districtwide middle school average in 1975-76 was 28% minority.

RECEIVING SCHOOLS

From Schools Closed	School	Geograph. Location	Estimated No. Students[c] W	Estimated No. Students[c] M	% Minority Before	% Minority After Expected	% Minority After Actual
#3	13	SW	36	43	19%	23%	26%
	19	SW	78	146	79%	70%	78%
	27	SW	47	200	15%	43%	52%
#4	11	SE	50	1	4%	4%	5%
	14	SE	134	3	4%	3%	6%
	17	SE	56	1	2%	2%	3%
	21	SE	73	2	2%	2%	4%
#7	18	SW	40	61	61%	61%	61%
	23	SW	95	145	31%	41%	41%
#12	9	SW	4	124	32%	54%	52%
	16	NW	66	3[d]	1%	2%	5%
	King	SW	6	171	83%	87%	98%
#15	26	NE	103	1	8%	7%	6%
	28	NE	172	1	2%	1%	2%
#24	5	Central	189	50	15%	11%	9%
	31	NE	1	53[e]	7%	23%	27%
Commerce	Burroughs	Central	46	73	15%	21%	26%
	Emerson	NW	55	55	3%	10%	17%
	Fermi	SW	11	68	48%	52%	56%
	Hawthorne	SW	7	57	50%	53%	54%
	Longfellow	SW	21	163	81%	83%	90%

[c] The expected enrollments are derived from district estimates based upon computations of racial enrollments for the affected schools. Tr. 11,902 (Armor); SB 806.

[d] Reflects former School 9 students reassigned to School 16.

[e] Reflects former School 5 students reassigned to School 31.

A more detailed examination of the 1976 school closings reveals a mixture of desegregative and segregative consequences,

all of which were foreseen by both the administration and the Board.

The closing of School 3 is a prime example of this mixed result. The closing of School 3 eliminated an increasingly racially identifiable school from Southwest Yonkers. The reassignment increased the racial enrollment of School 13 and, to a less favorable extent, School 27. School 27 was expected to change from 15% below the districtwide average to 13% above the districtwide average; it actually became a 52% minority school, 22% above the districtwide average. This change, however, was designed to be and was viewed by both Board officials and the Task Force as an integrative step. Tr. 9842 (Minervini); Tr. 12,926 (Dodson). On the other hand, a large number of minorities was reassigned to School 19, a physically inferior and heavily minority school.

The two school closings in East Yonkers were limited both in racial effect and desegregative intent. The closings eliminated two racially isolated (*i.e.*, over 95% white) schools and provided an opportunity for a sizable number of School 15 students to attend a somewhat more racially balanced facility. On the other hand, the closings left the vast majority of students in similarly racially imbalanced white schools. In addition, the elimination of Schools 4 and 15, both of which were underutilized facilities (80% and 70%, respectively), limited the opportunities which might otherwise have existed for future desegregation via the reassignment of minority students from educationally and physically inferior Southwest Yonkers schools .

The closing of elementary schools in Southwest Yonkers presents a similar amalgamation of positive and negative racial effects. The closing of School 7 eliminated a racially imbalanced minority school but did little to improve the racial balance of neighborhing schools to which School 7 students were reassigned. School 23, which formerly had a minority enrollment almost equal to the districtwide average, became an increasingly and

eventually predominantly minority school. Nevertheless, the large number of white and minority students reassigned to School 23 were afforded an opportunity to attend what was at the time a significantly more racially balanced facility. The Board failed to reassign minority students from School 7 to School 17, a 2% minority school approximately one-and-a-quarter to one-and-a-half miles from the eastern portion of the School 7 zone, rather than to School 23, slightly over one-half mile away, even though the Board simultaneously reassigned 127 (124 white) former School 4 students over one mile to School 14. The capacity and projected enrollment figures relied upon by the school administration, however, would appear to justify the Board's failure to adopt this alternative. Even without such a change, School 17 was projected to be only thirty-two students below capacity, while School 23 was projected to be 198 students below capacity.

The closing of School 12, while salutary insofar as it eliminated a highly racially imbalanced school from Southwest Yonkers, was largely segregative in its ultimate impact. Both School 9 and King became more racially imbalanced, solidifying King's identifiably minority image and tipping School 9, a previously racially balanced (32% minority) school, into predominantly minority status as well. While a fair number of black students were reassigned to School 9 and thus were provided with an opportunity to attend a more racially balanced school, a number of white students underwent the opposite experience as a consequence of being reassigned from School 9 to virtually all-white School 16. Thus, the elimination of one racially imbalanced school created or solidified the racial identifiability of three surrounding schools.

The School 24 closing was similar to the closing of School 12 in terms of its domino-like reassignment of students. The closing of this racially balanced school was of fairly negative racial consequence for School 24 students themselves, who were reassigned from a 20% minority to an 11% minority facility. It was

also similar to other school closings in the district in which racially balanced schools, including schools located in Central Yonkers which were thus particularly amenable to desegregation, were closed by the Board. *See* SCHOOLS IV.A.1 *supra*. On the other hand, a number of School 5 students from the Runyon Heights area, all but one of whom were minorities, were reassigned to School 31 in East Yonkers. Although this desegregative step deprived minority Runyon Heights students, for the second time, of their so-called neighborhood school experience by reassigning them to a school located across two major highways and roughly twice as far away as their former school, it was effectuated primarily in order to improve racial balance at School 31. Tr. 9842 (Minervini); Tr. 11,262 (Guerney).[102]

The closing of Commerce Middle School was significantly more desegregative in its racial consequences than was initially planned. The closing of Commerce eliminated a heavily racially imbalanced and educationally inferior school from Southwest Yonkers. The Commerce closing originally involved the anticipated reassignment of roughly 40% of its minority students to Longfellow, a plan which would have been segregative both for the reassigned students and for the Longfellow facility itself. The actual effect of the Commerce closing, however, was significantly more desegregative than the original enrollment projections indicated: in particular, Emerson's minority enrollment increased by ninety-two students, and Burroughs' by 117; Longfellow's minority enrollment increased by only twenty-four. These figures are consistent with the testimony of Director of Secondary Education John Guzzo and Commerce principal Patricia DiChiaro that efforts were made to reduce much of the originally anticipated segregative effect of the Commerce closing, primarily by reassigning more minority students to predominantly white Emerson and

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[102]The reassignment of students in this manner also demonstrates a willingness to impose considerable travel burdens when community opposition to desegregation efforts was largely absent. *See* SCHOOLS III.F.3 *infra*.

Burroughs. In fact, a comparison of the district's reassignment planning document and the district's 1976-77 middle school attendance zone lines confirms that a significantly minority-populated portion of the originally proposed Longfellow zone, including Pine Street, Grove Street and Ravine Avenue, was eventually included in Emerson's attendance zone. *Compare* GX 567 *with* SB 627; *see also* GX 430. In addition, this comparison reveals that a minority-populated portion of the originally proposed Burroughs zone, including Grant Park, St. Joseph's Avenue, and the Burke Housing project, was also rezoned to Emerson. Thus, in reassigning Commerce students, the district succeeded in improving the racial balance at two previously heavily white middle schools — an effort whose significance was recognized by Emerson administrative staff later that year. *See* P-I 34-17.

The Commerce closing was not without segregative consequences. Minority enrollment increased at Fermi, Hawthorne, and Longfellow, all of which became or remained predominantly minority schools. In addition, as a consequence of the Commerce closing, feeder patterns from Southwest Yonkers elementary schools to middle schools were divided in a fashion unknown in any other area of the district, with students from heavily minority School 6 and King attending four middle schools. In addition, the alternative of reassigning students to either Twain (1% minority) or Whitman (2% minority) in East Yonkers was rejected because of the travel distance which would have been involved, despite the request of the Commerce PTA that students be reassigned on an east-west basis, *see* GX 776, and the fact that some students reassigned to Hawthorne, Emerson and Burroughs would now be taking public transportation to school in any event. Tr. 12,653 (DiChiaro). Enrollment and capacity figures for 1976 and 1977 suggest that reassignments to Whitman in particular would have been feasible: Whitman, with a stated capacity ranging from 1,025 (Engineering Department) to 1,200 (1976 School Closing Plan), had an anticipated enrollment of 829 for 1976. GX 126.

The reassignment of whites and minorities to Fermi and Hawthorne did result in a more racially integrated experience for those students. The reassignment of minorities to Fermi, however, was effectuated in spite of the opposition of Fermi parents, both white and minority, to the assignment of additional minority students to the school, opposition which was based on a concern that the school would become racially identifiable if additional minorities were assigned there. Tr. 2483-84 (Guzzo). Yet given the fact that significantly more minorities were assigned to Emerson than both Fermi and Longfellow, despite the geographic proximity and substantial underutilization of the latter two schools, it is difficult to find that the assignment of minorities to these predominantly minority schools was a deliberately segregative act. The evidence regarding the closing of Commerce is instead consistent with the testimony of Superintendent Robitaille and others that the 1976 school closings and student reassignments as whole constituted attempts to effectuate modest improvements in racial balance, with more comprehensive efforts at school desegregation to be implemented in subsequent years.

On balance, the record suggests that fiscal, rather than racial, considerations were clearly the predominant factors underlying the decisions to close particular schools. The point system used by Superintendent Robitaille and his staff illustrates the extent to which racial balance, while a factor in determining the most suitable schools for closing, was only one of many relevant factors which were considered by school officials. To be sure, desegregative measures were also implemented where possible to do so in a manner consistent with the Board's overall fiscal objectives. Indeed, both the testimony of school officials and evidence of the numerical and racial impact of the school closings and student reassignments reflect the limited yet observable desegregative steps taken by the Board. On balance, however, the inconsistent racial consequences of the 1976 school closings and student reassignments, as compared with the more consistently followed race-neutral reasons underlying those same decisions, illustrate

the order of priorities which underlie the district's school closing decisions.

The Board's guarded receptivity to more desegregative alternatives to the 1976 School Closing plan is further evidence of its fiscal, rather than desegregative, priorities at the time. When confronted by school closing and reassignment alternatives encompassing a more aggressive pursuit of school desegregation, the Superintendent and his staff adhered to their initial recommendations, in some instances deliberately delaying school desegregation efforts for a future time. For example, the NAACP recommended to the Superintendent and Board that they consider closing the educationally troubled and underutilized School 6 (98% minority) and Longfellow Middle School (81% minority) and reassign their students in a desegregative manner. The NAACP also suggested the redrawing of high school attendance zone boundaries in order to alleviate increasing racial imbalance. Curtis Giddings, the Board's sole minority member, voted against the school closing plan primarily because of the plan's failure to make significant headway in eliminating racial imbalance in the district's schools. Giddings acknowledged, however, that the Board's primary concern was fiscal while his was racial, and that the plan did make some improvement in racial balance. SB 867. According to NAACP President Winston Ross and Superintendent Robitaille, the failure to adopt these proposals also reflected both the perceived infeasibility of their present implementation and the Superintendent's intention to recommend that these schools be closed as part of a future desegregation plan. Tr. 3604-06 (Ross); Tr. 4616-18 (Robitaille). Similarly, the Board's response to these suggestions acknowledged that the school closing plan was "not primarily concerned with desegregation and integration, but rather a fiscal solution to a monetary problem" and that some of the suggested alternatives would hopefully "be forthcoming." P-I 58-54.

In sum, the effect of the 1976 school closings on the racial balance of Yonkers public schools was decidedly mixed: while some aspects were desegregative, the rejection of alternatives for avoiding increased racial imbalance and for furthering desegregation reflect the district's decision to temporarily create or perpetuate racial imbalance until a more comprehensive desegregation plan could be developed. Given the circumstances in which the school closing plan was formulated and the reasons for its implementation, the liability of the Board for creating and maintaining racial segregation in the schools more appropriately turns on the circumstances underlying its subsequent failure to rectify the known segregative consequences of the 1976 School Closing plan.

c. Longfellow Middle School

The racially segregated condition of Longfellow Middle School, like the vast majority of the district's other schools, has been perpetuated primarily because of segregative omissions rather than affirmative acts: the failure either to close the school and reassign its students elsewhere, or to reassign students from other schools to Longfellow. The failure to eliminate the racial segregation at Longfellow represents the culmination of a long history of increasing racial imbalance at the facility, decreasing justification for keeping the facility open, repeated proposals to close the facility, and the repeated rejection of such proposals as the school became increasingly underutilized and racially segregated. The circumstances surrounding the continued racial imbalance at Longfellow is thus illustrative of the racial imbalance at many of Southwest Yonkers' public schools. Because of the particularly extensive nature of Longfellow's racial imbalance, physicial inadequacy, and proposals for closing, however, we will discuss it separately in our findings.

Since 1930, the Longfellow Middle School has been located in the former School 20 elementary school building, a relatively small facility with no outdoor recreational space. Racial imbalance at Longfellow, located in the northeast section of the

Southwest Yonkers area, has existed at least as far back as 1950, the year in which numerical evidence of estimated student enrollments is first available. In 1950, Longfellow's estimated minority enrollment was larger than any other junior high school in the district: the school was only 12% minority, but it also enrolled 41% of the district's junior high school minority students. SB 810.3. Since that time, the increasing racial imbalance at Longfellow has arisen partly because of the population growth in the Central West and Northwest Yonkers areas. This population growth led to the opening of several new junior high and middle schools and the repeated contraction of the Longfellow attendance zone. The effect of these school openings on Longfellow's student enrollment is reflected in the following table:

L O N G F E L L O W

Date	School Opening	% Minority, Before	Expected Decrease (Increase) in Number of Longfellow Students		% Minority, After
			W	M	
1954	Gorton	15%	72	0	16%
1963	Emerson	22%	228	108[a]	16%
1969	Burroughs	43%	42	(16)[b]	48%
1973	Commerce	79%	22	11	82%

[a]Includes estimated reassignment of seven whites and one minority to Franklin Junior High School. SB 810.7

[b]Represents (a) estimated reassignment of ninety-three whites to Burroughs and (b) estimated reassignment of fifty-one whites and sixteen minorities from Gorton. SB 810.7

Prior to 1963, the Longfellow attendance zone included areas of Central and Northwest Yonkers on both sides of the Saw Mill River Parkway. Until 1954, students attended both Longfellow and the Longfellow annex, located in Central Yonkers, east of the parkway. In 1954, the annex became part of the School 5 elementary/middle school facility and Gorton Junior High School was opened. From 1954 to 1963, Longfellow continued to draw students from the Runyon Heights and Homefield areas, both of which are east of the parkway and north of Tuckahoe Road. By 1960, Longfellow was 17% minority and, along with 17% minority Hawthorne, enrolled 71% of the district's middle school minority students.

The two most significant contractions of the Longfellow zone occurred when Emerson and Burroughs Junior High Schools were opened. These changes were either not significantly segregative in effect or not segregative in intent insofar as Longfellow was concerned. The 1963 redistricting of predominantly white Homefield residents from Longfellow to the newly opened Emerson facility, although responsive to residents' pressure for such a change, was based on race-neutral considerations. The construction of a new junior high school facility in Northwest Yonkers had been recommended in 1957 by the New York State Department of Education. GX 46, at 30. By 1960, the population growth in Northwest Yonkers prompted Superintendent Wynstra to recommend the acquisition of what is presently the Emerson site for the construction of a combined elementary/junior high school facility. SB 851. By 1963, Longfellow was operating at 107% to 135% capacity, whereas Emerson was operating at less than 60% capacity just after its opening.

During the remainder of the 1960's, Longfellow's total student enrollment remained relatively constant. SB 810.7; GX 64 (1963 - 540 students (estimated); 1967 - 530 students; 1969 - 573 students). The significant increase in Longfellow's percentage minority student enrollment from 1963 to 1969 was caused

primarily by the combination of two numerically inverse trends: increasing minority population in the Longfellow attendance area, which included the Mulford Gardens and Schlobohm subsidized housing projects, and the decline in white enrollment at Longfellow during this same period. From 1963 to 1967, Longfellow's white student enrollment declined from 455 to 331, while its minority student enrollment during this same period increased from eighty-five to 199. By 1967, Longfellow was 38% minority, the most heavily minority junior high school in the district. While some of this increase may be explained by demographic forces unrelated to conduct of the Board, it is reasonable to conclude that some portion of these changes was attributable to the educational inadequacies at the school, *see. e.g.*, GX 605, as well as the increasing minority population concentration in that area.

The opening of Central Yonkers' Burroughs Junior High School in 1969 was the result of increased overcrowding in surrounding middle and K-8 elementary schools. The need for an additional junior high school facility in Central Yonkers due to the anticipated population growth in the area was recognized as early as 1960 by Superintendent Wynstra and the Board's Buildings and Sites Committee. SB 851. By 1969, the student enrollments at five surrounding schools with junior high students (5, 8, Whitman, Gorton, Lincoln) were in excess of maximum capacity; two of these schools (Schools 5 and 8) were combined elementary/middle schools. At that time, Longfellow enrolled 676 students, with a stated capacity ranging from 650 (Phase II) to 820 (Engineering Department).

The effect of the Burroughs opening on Longfellow was racially segregative: an appreciable number of whites residing west of the Saw Mill River Parkway were reassigned to Burroughs. Those students, though they resided within approximately one mile of Longfellow, were even closer to the new and physically superior Burroughs facility. In addition, fifty-one white and sixteen minority students were reassigned from Gorton to

Longfellow, thus ameliorating the segregative effect of the aforementioned reassignment. Following the Burroughs opening, both Burroughs and Longfellow were operating at approximately the same level of capacity. These factors, and the absence of evidence indicating that racial factors were considered in opening Burroughs, support a finding that the reassignment of white students from Longfellow to Burroughs was not deliberately segregative in whole or in part.

The most significant segregative changes in Longfellow's enrollment occurred during the three years following Burroughs' opening. During this time, Longfellow's white student enrollment dropped by 147 students, over half of its 1969 white student enrollment. Since the Board made no attendance zone changes and the schools' minority enrollment remained relatively constant during this period (289 to 302 minority students), it is reasonable to infer that many white students either relocated or enrolled in private junior high schools in the Longfellow area.[103] As noted earlier, at least some of this decline is reasonably attributable to Longfellow's recognized inadequacy as a junior high school facility and the increase in minority population in that area of the city. Indeed, by this time, discussions regarding the inadequacies of the Longfellow facility and the proposed closing of the school were evident. In 1967, the Longfellow PTA urged the Board to reassign Longfellow students to Emerson, a proposal prompted largely by the perceived inadequacies of Longfellow's indoor and outdoor facilities. GX 605. The Board's 1969 capital budget request included an allocation for the conversion of Longfellow into an elementary school. P-I 51-57. By around 1970, Board members were beginning to consider closing Longfellow based primarily on

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[103]Longfellow's white student enrollment declined 52% from 1969 to 1972. White student enrollment at Most Holy Trinity, St. Casimir's and St. Joseph's K-8 private schools, all located in Longfellow's attendance zone, experienced only a 25% decline in white seventh and eighth grade white student enrollment (269 to 203 students) during the same period of time. SB 98.

its increasing racial imbalance as well as the relative quality of educational opportunity at the school. Tr. 5440 (Siragusa). Superintendent Mitchell's plans for converting Longfellow contemplated the reassignment of Longfellow Junior High School students to the recently opened Burroughs facility. P-I 51-64.

The closing of Longfellow was considered more seriously in 1972 as part of the district's consideration of a variety of proposals for reorganizing the district's secondary schools. *See* SCHOOLS IV.F.2 *infra*. Several proposals were considered for closing Longfellow and using the facility either for a variety of other educational uses (*e.g.*, as an elementary school or alternative high school) or as a facility for adult programs, drug programs, or sheltered workshops. GX 760, at 44,945; 761, at 42,808; 762, at 42,825.

While the closing of the Longfellow facility was considered beneficial, the reassignment of its students to other schools was considered problematic. The proposal which appears to have received more serious consideration was to close Longfellow and Franklin Junior High Schools and reassign their students to the old Yonkers High School facility as soon as the new Yonkers High School facility was opened. GX 115, at 43; 761, at 42,808. Franklin, like Longfellow, had been repeatedly recognized to be a physically inadequate facility. The 1973 Reorganization Plan adopted by the Board, however, recommended only that Franklin be closed and its students reassigned to the old Yonkers High School, renamed Fermi Middle School. Although there is a dearth of direct evidence explaining why only Franklin was recommended for closing, it is reasonable to conclude that the desire to avoid opening Fermi as a racially identifiable middle school was a primary consideration. According to Board member Rosemarie Siragusa, the proposed reassignment of Longfellow students to Commerce (as part of the proposed opening of Commerce Middle School) was considered inadvisable for similar reasons. Tr. 5442-43. Second, similar concerns were expressed

by white and minority Fermi parents three years later when the district proposed the closing of Commerce and the reassignment of some of its mostly minority students to Fermi. As an alternative to the proposed reassignment of Longfellow students to Fermi, Siragusa suggested to Superintendent Alioto and Board members that Longfellow students be reassigned to Twain Middle School, a recently opened 3% minority school in Southeast Yonkers. According to Siragusa, this proposal was rejected because of the long travel distances between the two schools and the perceived inability of Longfellow parents either to provide (through carpools) or to pay for the necessary transportation. Tr. 5442-45.

As a result, the Longfellow Middle School emerged virtually unaffected by the 1973 Reorganization Plan. The Commerce and Fermi Middle School openings had relatively little effect on Longfellow. Only thirty-three Longfellow students were reassigned to Commerce in 1974, a year after its opening. No students were reassigned to Fermi, which opened as a 41% minority middle school. By 1974, Longfellow was 76% minority, and had begun what was to become an uninterrupted decline in its student enrollment.

The Board's conduct since 1974 has consisted of a continued failure to implement desegregative proposals involving the Longfellow facility. As noted elsewhere in these findings, at least three specific proposals to close Longfellow were made in the mid to late 1970's. In 1976, the NAACP suggested that Longfellow be closed as part of the district's fiscally motivated school closing plan. In a letter to the Board, Yonkers NAACP President Winston Ross stated that the school's racial imbalance, age, and physical condition made Longfellow a desirable candidate for closing. GX 779. Ross also suggested that the elementary school portions of Emerson and Twain Middle Schools be closed to create additional room for the reassignment of Longfellow students. *Id.* Ross noted that the additional school closings would

reduce racial imbalance and would provide additional finanacial resources for program enrichment and rehiring of specialized school staff. *Id.*

While the desirability of closing Longfellow was recognized by the school administration, the Board's response to Ross stated that the school closing plan was concerned primarily with fiscal, rather than desegregative, considerations and suggested that Ross' proposals would be given future consideration. P-I 58-54. Consistent with the Board's position, Superintendent Robitaille decided that, based on Longfellow's age, high racial imbalance and surrounding redevelopment in the community, the school's closing would be recommended as part of the administration's forthcoming desegregation plan. Tr. 4631 (Robitaille).

In its 1977 Phase II Reorganization Plan, the administration recommended that the Board close Longfellow and return the facility to the City. The plan also proposed the closing of Emerson Elementary School (School 34) and the conversion of the Emerson facility into a two-year middle school.

The Board's failure to close Longfellow as recommended in Phase II is, as will be discussed further (*see* SCHOOLS IV.F.3 *infra*), difficult to explain in race-neutral terms. The school's size, age, underutilization and racial imbalance, in addition to the sizeable financial savings to be gained from the closing of a middle school, made it a prime candidate for such action. The capacity of the district's other middle schools also made Longfellow's closing a feasible alternative and a desegregative one as well. In particular, Twain Middle School (2% minority) was operating below its stated capacity; in 1978-79, the school year following Phase II's rejection, Twain Middle School was operating from 245 (Phase II) to 390 (Engineering Department) students below capacity, and thus could have absorbed a substantial portion of Longfellow's 426 students. By 1980, the conversion of the district's middle schools from grades 6-8 to 7-8 left Twain with 673 middle school students, below half its full capacity. While Twain

was certainly a considerable distance from the Longfellow attendance zone, such distances or other travel-related burdens did not prevent the district from simultaneously reassigning Burroughs students an even greater distance to Whitman, in Northeast Yonkers, in the aftermath of Phase II. Tr. 2522-24 (Guzzo). Some Twain students in the northwest portion of that school's attendance zone were also travelling a considerable distance (approximately two-and-a-half miles) to attend school. Financial considerations also would not have posed a significant problem, given the state's reimbursement policy with respect to transportation for purposes of desegregation and the fiscal savings to be generated by closing Longfellow.[104] In addition, the district made no efforts to consider the use of, or assist in arranging, privately-contracted transportation for Longfellow students, as it had done several times elsewhere in the district. Tr. 2521 (Guzzo). Instead, the Board kept the 89% minority school open, despite the recognized inadequacy of its facilities, its racial imbalance, and the increasing underutilization of the school.

The district also failed to adopt alternative measures for lessening racial imbalance at Longfellow, namely, reassigning former Burroughs students to the school. This proposal was suggested to the Board while the 1977 Phase II reorganization plan was still under consideration. Phase II recommended that Burroughs be converted into the new Saunders Trades and Technical High School facility and that Longfellow (as well as Fermi Middle School in Southwest Yonkers) be closed. GX 98, at 16-17. At an April 1979 Board meeting and in a May 1978 letter to Board President John Romano, the Longfellow PTA urged the Board to consider reassigning Burroughs students to

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[104]The total estimated ten-year cost of all transportation called for under Phase II was $400,000. GX 98, at 22. The estimated savings in operating costs from closing a single middle school facility was approximately $100,000 per year, *id.* at 21-22; the total savings (including staff-related costs) was approximately $500,000 per year. Tr. 4679-80 (Robitaille).

Longfellow in an effort to promote greater racial balance at the school and thus prevent the closing of the school, as was recommended in Phase II. GX 679, 852. The letter stated that this proposal would enable the Board both to avoid closing the two remaining centrally located middle schools in the district (Burroughs and Longfellow) and to achieve desegregation on the middle school level without resort to busing. GX 852. Indeed, both Longfellow and Fermi were located on the same side of the Saw Mill River Parkway as the westernmost portion of the Burroughs zone, just a fraction of the distance between this area and Whitman. Longfellow also was the very school to which students from this area had been assigned prior to the opening of Burroughs in 1969. In fact, students from the School 5 and former School 24 attendance areas had never before been assigned to either Emerson (in Northwest Yonkers) or Whitman (in Northeast Yonkers); since 1938, these students had historically attended Longfellow, Burroughs or the former School 5 Middle School.[105]

With Phase II's proposal to close Longfellow and Fermi still pending, the Board voted in April 1978 to reassign Burroughs students to Emerson and Whitman Middle Schools. GX 679. Although one month later the Board unanimously expressed its disapproval of the Phase II plan, it adhered to its reassignment of Burroughs students because of the possibility that Longfellow would eventually be closed. As a result, Burroughs students were reassigned up to four miles to Whitman, prompting over 100 families from the predominantly white western portion of the former Burroughs zone to request assistance from the Board in securing privately contracted transportation to attend Whitman. GX 880; P-I 69-47.

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[105]A notable exception was the assignment of Runyon Heights students from the School 24 zone to Emerson, an exception which was eliminated in 1973 because of race-related factors. *See* SCHOOLS IV.F.2 infra.

Although the closing of Longfellow was still a subject of some discussion among school officials in 1978 and 1979, the Board continued to maintain the school in its severely underutilized and racially imbalanced condition. In May 1979, Director of Special Services Robert Dodson recommended to Superintendent Joan Raymond that the district close Longfellow and reassign its students to the nearby Fermi Middle School. Dodson noted that this proposal would eliminate the problem of Longfellow's racial imbalance and would be feasible from a capacity standpoint. GX 754. Although Dodson could not recall why this proposal was not adopted, he noted that he had heard discussions concerning the Justice Department's prelitigation investigation into this case and the resulting uncertainty which school officials harbored as to the future state of the schools. Tr. 13,212-14. It is also reasonable to infer that this particular reassignment would have been resisted, as it had in earlier years, because of the racial imbalance which would have resulted at Fermi, a 58% minority school which would have become 72% minority had Dodson's proposal been adopted. Consideration was apparently not given either to reassigning Longfellow students to schools in East Yonkers, or to reassigning former Burroughs students, who were now attending Whitman and Emerson, to either Longfellow or Fermi.

We recognize that the initial failure to reassign students to Longfellow or Fermi was caused primarily by the possibility that these two schools would be closed. We also recognize that the Longfellow facility's physicial inadequacies made reassignments to the school a less than optimal prospect. It certainly cannot be suggested, however, that a school district can credibly justify its refusal to close an underutilized, heavily minority school based on the transportation burdens involved in reassigning its students, yet allow it to simultaneously reassign nearby white students to a newer, physically superior school over four miles away because of the possibility, never implemented, that the predominantly minority schools would eventually be closed. *Cf. NAACP* v. *Lansing Board of Education,* 429 F.Supp. 583, 603-04 (W.D.Mich. 1976),

aff'd, 559 F.2d 1042 (6th Cir.), *cert. denied*, 434 U.S. 997 (1977). The racial imbalance and severe underutilization of Longfellow and Fermi, as well as fiscal and facility-related considerations, made either the closing of Longfellow and/or Fermi *or* reassignments to Longfellow and/or Fermi superior, less segregative alternatives to the one consistently adhered to by the Board.

As of 1980, Longfellow was 94% minority, by far the district's most segregated middle school. The school was operating at 31% (Engineering Department) to 40% (Phase II) capacity, also well below any other school in the district. The school remained open despite its physical and educational inadequacies, the costliness of maintaining it in its underutilized state, and the foreseeable decline in its enrollment, *see* GX 98, at 2-8 — the very factors which compelled the district to close seven schools in 1976. Although the groundwork for Longfellow's racial imbalance was laid before the Board played any significant deliberately segregative role with respect to the school, the Board's conduct during the 1970's served to maintain the school's increasing racial imbalance. While neutral reasons predominated in the Board's failure to close the school in earlier years, by the later 1970's racial considerations played an increasing role in both the proposals to close the school and the failure to adopt these proposals. Based on the above, we find that the continued operation of Longfellow as a racially segregated and severely underutilized middle school was not only a foreseeable consequence of the Board's inaction but was in part the result of the Board's general unwillingness to implement desegregative measures in the Yonkers public schools. *See Berry* v. *Benton Harbor, supra*, 442 F.Supp. at 1308-10 (discussing failure to remedy segregation at junior high schools).

4. Attendance Zone Changes

a. Schools 16 and 25

Schools 16 and 25 are located less than one mile apart in the Northwest Yonkers area, just east of the Hudson River. School 16

is located on North Broadway and School 25 is located to the southwest on Warburton Avenue. The two schools are separated by a steep hill which, according to geological surveys and personal observation, is one of the steepest hills in Yonkers. The hill slopes from North Broadway downward to Warburton Avenue and the river. School officials testified that during the winter they must travel on fairly circuitous routes in order to avoid the hill separating the two schools. Tr. 4544-45 (Radko); Tr. 11,176-77 (Guerney).

Prior to 1953, some students attending School 25 resided in an area as far east of the school as North Broadway, at the top of the hill. At that time, few minorities lived in the School 16 or 25 areas; the estimated elementary school enrollments in 1950 were 0% minority at School 16, and 4% (thirteen students) minority at School 25. SB 810.2. Starting in the mid-1950's, an increase in the minority population residing in the School 25 area occurred. This increase was occasioned by the first boundary change, in 1953, between Schools 25 (4% minority) and 16 (0% minority); thirty-five white students were reassigned from School 25 to School 16. While this boundary change was segregative in its impact, the rezoned area was located at or near the top of the hill separating Schools 25 and 16 and thus made the trip to school for the affected students more manageable from a topographical standpoint. Such considerations were in fact expressly noted by the Board less than one year later with respect to the middle school assignment of School 25 students. GX 717. The Board also had just redrawn the School 6 attendance zone boundaries so as to include whites in the school 25 area, and percentage minority enrollments at School 16 (513 whites) and 25 (392 whites, seventeen minorities) were virtually identical at the time of the boundary change.

Minority enrollment at School 25 steadily increased over the next fifteen years, reaching 41% in 1967; School 16 remained almost totally (99%) white during this period of time. During the

1960's, three boundary changes occurred between the two schools. The effects of these changes are as follows:

Before Change			Students Reassigned from 25 to 16		After Change	
Year	% Minority, School 25	% Minority, School 16	W	M	% Minority, School 25	% Minority, School 16
1963	14%[a]	0%[a]	9	0	14%	0%
1964	14%[a]	0%[a]	23	9	13%	2%
1968	42%	1%	6	0	43%	1%

[a]Based on 1961-62 school enrollment data. Tr. 11,902 (Armor).

For a number of reasons, we find that these changes constitute a pattern of segregative acts by the Board sufficient to give rise to a finding of segregative intent.

The 1963 change is the most troubling. The rezoned area (Arthur Place) is located closer to Warburton Avenue (and School 25) than to North Broadway (and School 16). Thus, students living in this area had to travel even farther up and down the hill between the two schools as a result of the boundary change. While the route separating Arthur Place from Warburton Avenue is a steep and winding one, the longer route separating Arthur Place and North Broadway is also difficult to negotiate. And while the disparity in racial enrollments at the two schools was fairly small according to Dr. Armor's estimates, it is reasonable to conclude, based on the fact that these estimates were based on actual enrollment data of earlier years and that West Yonkers was undergoing a period of significant demographic change at the time, that the actual disparity was appreciably greater.

As for the 1964 boundary change, several factors persuade us that racial factors may not have been a factor in this particular change. First, the inclusion of several minorities in this change

actually had a desegregative effect on both Schools 16 and 25.[106] Second, contemporaneous evidence regarding the change demonstrates that safety and convenience factors were actually considered by school officials in implementing this change. SB 638. In this particular instance, an examination of topographical and attendance zone maps does not undermine the legitimacy of these factors: the rezoned area is located closer to North Broadway than to Warburton Avenue. Third, while the district failed to reassign these students to Schools 9 (12% minority in 1961-62) or 6 (45% minority), both of which were considerably closer than School 16, capacity and school enrollment data suggests that overcrowding at School 6 and 9 (a condition which was soon to lead to the planning and construction of the King Intermediate School) made such a reassignment infeasible.

The 1968 boundary change involved six students from an area located closer to both Warburton Avenue and School 25 than to North Broadway and School 16. The boundary change thus required the affected students to travel a hilly and more lengthy route to School 16. The area in question also was near an area subsequently characterized by community opposition to the assignment of its students in a desegregative fashion, *see* SCHOOLS IV.A.2.a *supra*, SCHOOLS V.E.1 *infra*, suggesting that such opposition played a role in the 1968 School 16/25 boundary change. By this time, the racial imbalance between the two schools was substantial, making the segregative impact of the boundary change clearly foreseeable.

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[106]It is unclear whether the minorities included in this boundary change included Asians. Tr. 11,947-48 (Armor). Given that the rezoned area in question is located in the southernmost portion of School 16's attendance zone, closest to increasingly minority Southwest Yonkers, it is likely that at least some of the nine estimated "minorities" reassigned to School 16 were in fact black or hispanic. In any event, our analysis does not depend on the resolution of this uncertainty.

Additional evidence persuades us that the topographical considerations noted above cannot fully explain the segregative boundary changes involving Schools 25 and 16. Such considerations have often been overcome in implementing particular student assignments in Yonkers. For example, the closing of School 15 in 1976 resulted in the reassignment of students over hilly terrain to Schools 26 and 28; the closing of School 1 in 1954 resulted in students travelling up the steep hill to School 5; Japanese-American students living in the northernmost portion of the School 25 zone have been assigned to School 16. While neutral considerations justified the boundary changes and resulting travel burdens which students were forced to endure in each of these cases,[107] the frequent imposition of such travel burdens undermines the Board's argument that topographical considerations necessitated the School 16/25 boundary changes. The Board's contention is particularly unpersuasive in light of its previous inclusion of the North Broadway area of the School 16 zone — located at the top of the School 16/25 hill — in School 25's attendance zone. In addition, the fact that School 25 students must travel over the same hilly terrain to attend either Emerson or Longfellow Middle School also is inconsistent with reliance on topographical considerations to justify the boundary changes between Schools 16 and 25. *See* Tr. 5476 (Siragusa).

We recognize that even school administrators widely known for their commitment to school desegregation have noted the topographical features of the School 25/16 area in considering whether to implement desegregative boundary changes between

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[107]Japanese-American students attended School 16 for the purpose of participating in English-as-a-Second-Language programs provided at the school. Frank Dep. 261-62. The closing of School 15 and reassignment of its students to Schools 26 and 28 was justified by fiscal considerations which forced the district to undertake oftentimes burdensome and inconvenient measures in an effort to comply with state-imposed financial constraints. *See* SCHOOLS IV.A.3.b *supra*.The closing of School 1 resulted in the elimination of the district's only predominantly minority school. *See* SCHOOLS IV.A.3.a *supra*.

the two schools. Tr. 5414-15, 5475 (Siragusa) (discussion with Superintendent Mitchell); *see also* Tr. 11,034 (Jacobson). Yet a careful examination of the specific boundary changes which have been effectuated in the School 16/25 area, the racial impact of these changes, and the inconsistent or unpersuasive invocation of topographical considerations to explain these changes, convince this Court that the changes which occurred constitute a pattern of conduct designed to perpetuate the increasing racial imbalance between the two schools. We conclude that the evidence supports a finding that the racially imbalanced condition of Schools 25 and 16 has been caused in part by deliberately segregative conduct in the redrawing of attendance zone boundaries between these two schools.

B. Equal Educational Opportunity

The disparities between schools in Southwest Yonkers and elsewhere in the Yonkers School District are not only racial, but educational as well. A substantial amount of evidence in this case has focused on both the inadequacies of Southwest Yonkers schools as educational facilities and the efforts of the Board to deal with these inadequacies. An examination of several of the most significant characteristics which are relevent in determining the quality of a school's educational program firmly establishes some general conclusions which are relevant to plaintiffs' allegations of unlawful segregation and discrimination: namely, the existence of disparities in educational opportunities available at racially identifiable white and minority schools, the recognition by Board members and school officials of these disparities, the partly successful efforts of the Board and school officials to ameliorate the effects of some of these disparities, and the racially influenced failure of the Board to correct other known disparities.

The quality of education provided at any school, as well as the community's and school administration's perceptions of the school, is influenced largely by a number of key school-related

attributes: physical characteristics, such as building and site size, age, playground space, and the general condition of the facility; teaching and administrative staff characteristics, including their level of experience, their expectations of student ability, and their rate of turnover, or movement in and out of a particular school; student-related characteristics, including student mobility or turnover rates, size of student enrollments and school overcrowding, and disciplinary problems among students; and educational programs or curriculum, including curricular offerings and programs for the advanced, the average, and the below-average student. Each of these categories will be discussed in turn.

1. Physical Characteristics

In general, Southwest Yonkers public schools bear all the marks of the typical urban school facility, while the East and Northwest Yonkers schools are distinctly more suburban in nature. In terms of building and site size, schools in Southwest Yonkers are, as a general matter, indisputably inferior. The five most heavily minority elementary schools, Schools 6, 10, 19, 25, and King, have an average site size of 1.83 acres (range: .93-2.52); the nine most heavily white elementary schools (at least 90% white) average 4.84 acres in site size (range: 1.33-9.53). The three predominantly minority middle schools, all located in Southwest Yonkers, have an average site size of 2.4 acres (range: .8-3.8); the two East Yonkers middle schools average 9.5 acres (range: 6.8-12.2). Yonkers and Gorton High Schools in West Yonkers are 8.0 and 6.38 acres, respectively; Lincoln and Roosevelt High Schools in East Yonkers are 23.41 and 12.64 acres, respectively. GX 644.

The physical disparities in the school buildings themselves were accurately summarized in a 1977 report to the district's school facilities committee. The report, prepared by Director of Elementary Education Joseph Guerney, noted that Southwest Yonkers elementary schools generally suffered from a lack of classroom space, limited instructional areas for educational spe-

cialists (*e.g.*, music, art, reading), and inadequate cafeteria facilities. The report noted that these problems existed only "to a limited extent" in Northwest Yonkers schools and were "not apparent" in East Yonkers schools. GX 483. Similar disparities have existed, and to some extent continue to exist, at the secondary school level as well. Since 1930, Longfellow Middle School has been located in the former School 20 elementary school facility, a building which has long been recognized by school officials and parents as a physically inadequate middle school facility and has been repeatedly recommended for closing. GX 605; Tr. 12,868-69 (Dodson); SCHOOLS IV.A.3.c *supra*. Until 1974, Yonkers High School was located in the old Franklin Junior High (presently Fermi Middle School) facility; the physical inadequacies of this facility led parents to complain bitterly and even to request that the high school attendance zone boundaries be redrawn so that a more equalized distribution of physical facilities and educational opportunities could be achieved. GX 493, 494, 619. Franklin Junior High School was located in the former School 2 elementary school facility, a building whose physical inadequacies led to its closing in 1974. Hawthorne Middle School used several storage closets as classrooms during the 1970's as a result of the school's physical limitations and high student enrollments. The School 10 facility was constructed in contemplation of its use as a K-3 primary school but has since been used as a K-6 elementary school.

In terms of age, the Yonkers public schools are relatively evenly distributed between East and West Yonkers. Most of Yonkers' public schools were built long before the presence of substantial numbers of minorities and prior to the development of subsidized housing in Southwest Yonkers. By 1930, the district had constructed Schools 1-25 and School 27 and approximately one-half of the presently utilized secondary school facilities. While Southwest Yonkers middle schools are substantially older than their East Yonkers counterparts, three of the four regular schools built since 1968 are located in the Southwest Yonkers

area: King (1968), School 10 (1972), and Yonkers High School (1974). In addition, most of the district's oldest elementary schools in both East (Schools 4 and 15) and West Yonkers (Schools 3, 7, and 12) were closed in 1976. Even with equally old facilities, however, such as Southwest Yonkers' School 6 (opened in 1889) and East Yonkers' School 8 (opened in 1892), the physical condition and overall reputation of School 6 is generally considered by Board members to be inferior. Tr. 5037-38 (Jacobson); Weiner Dep. 412-14.

The most striking disparity in physical facilities is in the playground and recreational space at West and East Yonkers schools. Many of the district's newer East Yonkers schools, such as Schools 26, 28, 29, 30 and 32, all have sizable grass-covered play areas outside the school building. Several Southwest Yonkers elementary schools, on the other hand, have little or no playground space; instead, they generally contain small, cement-covered play areas in back of the school. While some of these inadequacies, such as the lack of play space at Schools 7 and 12, were eliminated in 1976 as part of the district's school closings, substantial disparities still remain, particularly at School 6, *see* Tr. 4610 (Robitaille), GX 475, 476, School 10, which is both surrounded by the Riverview subsidized housing project and has inadequate indoor recreational space as well, Tr. 4992 (Jacobson); Tr. 11, 642-43 (Leahy), and School 19, where most of the available play area is used for parking. Tr. 13,471 (Steinberg). Longfellow and Fermi Middle Schools in Southwest Yonkers have no outdoor recreational facilities, and until 1974 Yonkers High School (then located in the Fermi facility) suffered from a similar inadequacy. Even among schools with no play space of their own, such as King (Southwest) and School 22 (Northwest), disparities exist with respect to the nearby available recreational space.

The impact of these disparities is significant. School officials recognized that adequate recreational facilities were not only

important to a student's physical development but were an important ingredient in enabling students to better benefit from the instructional aspects of the educational process as well. Tr. 4610 (Robitaille). School principals testified that inadequate recreational facilities were likely to result in increased disciplinary problems at the school. *See* Tr. 4713-14 (Jamieson); Tr. 12,773 (Marra).

The importance of a school's physical condition to the quality of educational experiences available at the school, as well as to the students' and community's perceptions of the quality of these experiences, has been recognized by school officials both within and outside the Yonkers school system. A 1957 survey of the Yonkers Public Schools recognized that the inadequacies of a school's physical attributes and overall condition are difficult to overcome even with the leadership of competent and dedicated administrators and staff. GX 42, at 27. The study also noted the impact that such inadequacies had on students, specifically, that students perceive an indifference on the part of educational authorities as a result of poor conditions at their school. *Id.* at 39. This conclusion was shared by school officials as well. *See* GX 609.

While most of the Yonkers public schools have suffered at one time from various inadequacies in their physical condition, Southwest Yonkers schools have generally been more seriously affected in this respect. Elementary schools such as Schools 3, 6, 7, and 19 were and in some instances still are regarded as particularly inferior facilities. The various physical inadequacies at Schools 3 and 7 were recognized by various school officials, *see* GX 518, 524, 526, and led in part to their closing in 1976. GX 126, at 6-8. Other schools, such as Schools 6 and 19, have been repeatedly singled out as wholly inadequate facilities and have been repeatedly recommended for closing as a result. Tr. 4973 (Jacobson); Tr. 5424 (Siragusa); Tr. 5512-13 (Minervini); Tr. 11,205-07 (Guerney); GX 507. School 19's condition was recog-

nized as particularly inadequate, but the district refrained from expending financial resources to improve the school's condition because of the anticipated, but never effectuated, closing of that facility. P-I 19-27; Schainker Dep. 249-50. The deficiencies in physical conditions at East Yonkers schools, on the other hand, were substantially less severe in nature. *See, e.g.*, GX 454 (School 32); P-I 8-17 (School 8); Tr. 4754 (Jamieson) (comparing Schools 19 and 30).

The Board did make some attempts to eliminate some of these disparities; for example, the district closed Franklin and Commerce[108] Middle Schools, both of which had significant problems with respect to their overall physical condition and the adequacy of their physical plant. GX 559; Tr. 2472 (Guzzo); Tr. 12,645 (DiChiaro). In addition, the recent construction of King Elementary School and Yonkers High School resulted in the addition of two modern and well-equipped facilities to Southwest Yonkers. Tr. 12,901 (Dodson); SB 654. School 10's "school without walls" structure, designed specifically for an open education teaching philosophy, was considered unique and impressive from an internal structural point of view. SB 183. In addition, the fiscal limitations on the district's ability to improve or expand existing Southwest Yonkers facilities was not without impact on East Yonkers schools. *See, e.g.*, SB 573 (difficulties with expansion of Roosevelt High School). Nevertheless, the record as a whole reflects the existence of more significant deficiencies in physical conditions at many of Southwest Yonkers' elementary and middle schools. These inadequacies, along with the physical disparities noted above, have resulted in inequalities in the educational opportunities available to the many minority students attending Southwest Yonkers schools. Alioto Dep. 47-48.

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[108]The poor conditions at Commerce were in part the reason for Superintendent Alioto's creation of a special task force in 1974 to assess overall conditions at the school. GX 559.

2. Staff

With respect to teaching and administrative staff, plaintiffs have attempted to demonstrate the denial of equal educational opportunity to students attending disproportionately and predominantly minority schools in three ways: (1) the relative inexperience of teachers in such schools, as compared with teachers in identifiably white schools; (2) the high turnover of faculty and administrative staff in disproportionately minority schools; and (3) the low teacher expectations of student abilities in such schools.

Statistical and testimonial evidence submitted by both plaintiffs and the Board demonstrate that, in general, predominantly or disproportionately minority schools in Southwest Yonkers have been staffed by teachers with fewer years of experience than staff assigned to other schools in the district.

Plaintiffs submitted numerical evidence concerning teacher experience levels for the years 1960-76. GX 88-90, 93d. This analysis includes the experience levels for English, math, science, and social studies teachers. The analysis did not include reading or other teachers assigned to work in specially funded remedial programs, and did not include art, business, language, music, physical education, or shop teachers. Tr. 3374-75 (Sweeney). The exclusion of these teachers has its benefits and drawbacks: while it provides greater comparability in terms of the types of faculty employed systemwide, as opposed to teachers in particular remedial or other unevenly distributed programs, it consequently understates the size of a school's faculty and total years of experience of that faculty, and excludes teachers who were utilized on a full-time basis in some of these schools. To the extent that the trends highlighted in this analysis are corroborated by the testimony of school officials and by the Board's more inclusive analysis for the years 1976-80, however, plaintiffs' statistical evidence concerning teacher experience levels is informative. In 1961-62, schools in East and Northwest Yonkers actually had

lower overall teacher experience levels. Of the ten elementary schools with less than 1% minority students, four had teacher experience levels below the districtwide average of 11.31 years, including the three schools (26, 29, 32) with the lowest averages (below six years) in the district. Of the five schools with over 20% minority enrollments, three schools (6, 7, 19) had faculties with greater than the districtwide average in experience. A similar pattern existed at the secondary school level as well. GX 88.

By 1967-68, the trend had changed somewhat: the range in teacher experience at 40% (or more) minority elementary schools was 5.61-7.88 years; similarly, the range at less than 1% minority elementary schools was 5.50-8.00 years — all below the 8.45 years districtwide average. Of the six schools with staffs averaging over ten years in experience, however, four schools (4, 16, 21, 22) were less than 4% minority (the other two were School 5 (11% minority) and School 27 (9% minority)). Experience levels at the secondary school level remained relatively even.

By 1971-72, the divergence in staff experience levels began to clearly materialize. Of the seven elementary schools with at least 40% minority enrollments, six of them were below the districtwide average (7.15 years) in teacher experience, ranging from 3.33 to 6.19 years. Of the thirteen elementary schools with under 5% minority enrollments, only two of them had below average teacher experience levels (School 21 - 5.31 years; School 14 - 6.25 years). Of the four schools with staffs averaging over ten years in experience, three schools (17, 30, 32) were virtually all-white schools in East Yonkers.

By 1973-74, this trend appeared at the high school level as well: Gorton (24% minority) and Yonkers (34% minority) had staffs averaging 5.89 and 9.22 years of experience, respectively, while Lincoln (3% minority) and Roosevelt (7% minority) had staffs averaging 11.12 and 12.15 years of experience, respectively. By 1975-76, the year in which the city's fiscal crisis resulted in substantial reductions in teaching staff, seven of the district's

eight predominantly minority schools had average teacher experience levels below the 10.60 years districtwide average, including the four schools with the most inexperienced staffs in the district (Schools 6, 10, 19 and 25, ranging from 4.75-7.53 years). As in 1971-72, eleven of the district's thirteen most predominantly white (less than 5% minority) elementary schools had staffs with greater than average experience levels (ranging from 10.86-16.64 years). A similar disproportion existed at the high school level as well.[109]

The Board's analysis, SB 807, reflects two significant differences in teacher experience levels. First, it includes all instructional staff, rather than teachers in the four categories examined by plaintiffs. Second, it reflects the termination of over 250 faculty members in 1976, a disproportionate number of whom were less experienced teachers assigned to Southwest Yonkers schools, Tr. 2569 (Guzzo); Tr. 4578-79 (Robitaille); GX 774, 775, and the resulting reassignment of more experienced teachers to these schools.

While the overall teacher experience levels increased as a result of the 1976 staff terminations, the disproportion in relative staff experience continued. In 1976-77, all seven of the district's predominantly minority elementary schools had staffs with below average experience levels, with four of them maintaining staffs with under ten years average teacher experience (versus 12.3 years districtwide average). All three Southwest Yonkers middle schools had staffs with less than average experience (range: 8.3-9.8 years), while three of the other four middle schools in the district had staffs with greater than average experience levels

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[109]Disproportion at the middle school level was generally absent during the years analyzed by plaintiffs. Even here, however, minor trends are detectable: the most inexperienced staff in 1970 and 1971 was at Gorton Junior High School (less than five years average experience), which at the time was also experiencing considerable race-related disturbances. *See* SCHOOLS IV.F.2 *infra*.

(range: 10.8-13.6 years). A similar pattern existed at the high school level as well.

By 1979-80, the relative imbalance in teacher experience levels, and resulting impact on educational opportunity, had been substantially reduced. Although the pattern at the elementary school level was similar to that of prior years — again, all seven of the district's predominantly minority elementary schools had staffs with less than the districtwide average experience — the range of average teacher experience at these schools had increased to 9.9-13.4 years (as to compared to 14.2 years districtwide average), a significant increase from 4.75-7.53 years range of four years earlier. In addition, the imbalance in teacher experience was even smaller at the middle school level, and was essentially non-existent at the high school level. Thus, while imbalances persisted at lower grades, the marked increase in absolute experience levels at predominantly minority schools reduced the problems associated with the imbalance in experience levels of earlier years, when both imbalance and significantly greater inexperience (in absolute number of years) among teachers in Southwest Yonkers schools combined to create more significant disparities in teacher experience levels among the district's public schools.

The overall trend in teacher experience levels, a trend recognized by school officials and Board members, Tr. 4614-15 (Robitaille); Tr. 5039 (Jacobson); Alioto Dep. 48; Schainker Dep. 110; *see also* Tr. 4065 (Sobel), was caused by a variety of interrelated factors. The primary source of the disparity was the teacher transfer provisions of the district's collective bargaining agreements with the Yonkers Federation of Teachers, the teachers' union. Under these agreements, which have been in effect since 1969, teachers presently employed in the school district were afforded the right to apply for a staff vacancy, on a seniority basis, before the Board could hire additional staff from outside the district to fill the position. This provision has resulted in a general

movement of more experienced teachers from West Yonkers to East Yonkers schools, a trend which was established almost immediately after the implementation of the seniority transfer provision in 1969. As both Board members and teachers themselves recognized, this west to east movement was caused primarily by the generally superior reputation of East Yonkers schools, a reputation created in part by smaller class sizes, superior physical conditions, and the "easier" teaching conditions in those schools. This phenomenon was also attributed to a concomitant "burnout" among West Yonkers teachers, caused largely by the general absence of the aforementioned conditions in Southwest Yonkers schools. As a result, staff openings were created in Southwest Yonkers schools and were generally filled by newly hired teachers with less experience than other teachers in the district.

Plaintiffs do not contend, and we do not find, that experienced teachers are necessarily or inherently more capable than new teachers. Indeed, in Southwest Yonkers schools, some principals preferred to have younger teachers on their staff because of their flexibility, receptivity to change and educational innovation, and the "new blood" which these teachers brought to their respective schools. Tr. 11,636-38 (Leahy); Tr. 12,589 (DiChiaro); Tr. 13,472 (Steinberg). However, both Yonkers school officials and educational surveys performed for the school district recognized that, as a general matter, a balance of experienced and inexperienced teachers was desirable from an educational standpoint and the acknowledged lack of such a balance among the district's schools (elementary schools in particular) was a contributing factor to the inequality of educational opportunities among the district's schools. Tr. 4615 (Robitaille); Tr. 13, 232 (Dodson); Alioto Dep. 47-48; GX 41, at 40; 587. While this lack of overall balance in teacher experience was ameliorated somewhat in recent years by the systemwide increase in teacher experience levels, the disparity in experience levels prior to that time served to deprive Southwest Yonkers students of a level of educational opportunity available elsewhere in the district. And as

with the teacher assignment practices which led to the disproportionate presence of minority teachers in Southwest Yonkers schools, *See* SCHOOLS IV.E *infra*, the Board did little in the early to mid-1970's to alter the often-significant disparities in teacher experience levels.

Staff turnover, particularly in certain Southwest Yonkers schools, also detracted from the quality of educational experiences provided to students. The generally more demanding conditions at Southwest Yonkers schools and the resulting eastward movement of more experienced teachers in the district served to increase the frequency with which Southwest Yonkers staff members were replaced. Specific instances of unusually high staff turnover occurred at School 10, where fourteen of the seventeen teachers originally hired by the Board in 1972 had left the school after only two years of operation. This turnover had a particularly negative impact on the quality of educational instruction at the school because of the need for, and resulting lack of, staff members who were specially trained in School 10's open education teaching methods, a factor recognized by School 10's first three principals, Tr. 4797-4803 (Jamieson); Tr. 11,633, 11,636-41 (Leahy); Tr. 13,320 (Cantor), and by the Board as well. Tr. 9838 (Minervini). The turnover among principals at School 10 was of similarly negative effect; in five years, the school was led by three different principals, each with their own distinct educational approach. Frequent turnover among principals in Southwest Yonkers schools existed in Commerce Middle School (three principals during its three-year existence) and King Elementary School (three principals in its first four years) as well.

Again, not all staff turnover was without underlying educational benefit: the determination of some Southwest Yonkers school principals to implement measures designed to eliminate staff-related educational inadequacies at particular schools contributed to the staff turnover at these schools. Schainker Dep. 83-84; Tr. 4749-51 (Jamieson). Still, the existence of generally more

frequent turnover at many of the district's disproportionately minority schools detracted from the educational opportunities available at these schools, a fact which was recognized by at least one Board member, Tr. 10,983 (Jacobson), and several school principals, Tr. 4713 (Jamieson); Tr. 11, 657 (Leahy); Tr. 12,975-76, 13,155 (Dodson), and which was a source of concern among community members as well. GX 547 (School 25 PTA).

Teacher expectations epitomize the manner in which intangible and unquantifiable components of the educational process can impact upon student achievement and the educational atmosphere of a school. Schainker Dep. 246, 261; Tr. 4712-13 (Jamieson). While the record, particurlarly the documentary record of school principal evaluations and budget requests, reflects that many of Southwest Yonkers' school staff members were concerned with and dedicated to the educational welfare of minority students, some departures from this pattern existed and were recognized by several school officials and special task forces. A number of Southwest Yonkers schools were afflicted at various times by attitudes among administrative or instructional staff that minority students were less capable of educational achievement, a condition which obviously impacted negatively on student achievement. Assistant Superintendent of Schools Stanley Schainker testified that particular problems of this sort existed at Schools 6, 18, and King elementary schools, Commerce and Longfellow Middle Schools, and Yonkers High School. Schainker Dep. 60-65, 78-82, 113-16, 143-49, 251; GX 455. The low expectations or general lack of educational atmosphere at School 6 existed primarily during the late 1960's to early 1970's, and was recognized by parents and school officials. Tr. 4329 (Barrier); Tr. 4821 (Jamieson), Tr. 5043-46 (Jacobson). The problems which Schainker noted at Commerce and Yonkers were consistent with the findings of task forces assigned to investigate educational conditions at the schools as well as the observations of community members. GX 559; Tr. 5240-42 (Morris).

Not all of the district's predominantly minority schools were similarly affected by discriminatory staff attitudes; the administrative and instructional staff at School 10 and Hawthorne Middle School, for example, were generally depicted as being generally devoid of similarly low educational expectations of their students. In addition, the more severe problems noted above, such as those at Schools 6 and 18, were generally rectified by school officials by removing those employees considered responsible for those conditions. Schainker Dep. 72, 74, 80-81. We are unable to conclude on the record before us that the discriminatory attitudes noted above were, in light of the district's recognition of and attempts to ameliorate this problem, evidence of the district's implementation of a policy of intentional discrimination. Nevertheless, the evidence concerning teacher expectations, including the district's need to take the remedial steps described above, demonstrates an awareness of the educational problems created by segregated schools and of the adverse consequences on minority students.

3. Students

The quality of educational opportunities available to students in Yonkers public schools may also be measured in part by characteristics relating to the students themselves. One of the most troubling features of Southwest Yonkers schools is the unusually high turnover in their student populations. The high mobility of minority students in Southwest Yonkers was primarily the result of considerable demographic change in the area, caused in part by the City's urban renewal efforts and the concomitant displacement and relocation of Southwest Yonkers residents. Plaintiffs have submitted numerical evidence of districtwide student turnover for the 1975-78 period which unmistakably demonstrates the significantly higher student turnover in the district's predominantly minority schools. GX 815. This phenomenon was also the constant object of attention of principals and school officials in earlier years. School "Background Information" reports prepared by school principals highlight particularly severe

instances of high student turnover: 500 students entering or leaving School 19 in 1971-72, when its total student enrollment was 669 (GX 539; Tr. 12,716 (DeFino)); 140 students entering or leaving School 10 during its first year, when the school's total enrollment was 239 students (GX 506); 184 students entering or leaving School 3 in 1974 (GX 518). *See also* GX 526 (School 7); Tr. 13,246-47 (DeFino) (School 18); GX 601 (Franklin Middle School).

The impact of the high student turnover in Southwest Yonkers schools and the district's response to it are both troubling. It is difficult to overstate the disruptive effect of such turnover and the consequences for all students involved. Many school officials recognized the negative impact which the high degree of student turnover had on the educational process at Southwest Yonkers schools. Tr. 4762-64 (Jamieson); Tr. 5040, 10,925 (Jacobson); Tr. 13,269 (DeFino); Schainker Dep. 247-48. This phenomenon was particularly disruptive in Yonkers since much of the student turnover consisted of movement between schools within the city itself, rather than in and out of the district as a whole. Tr. 10,925 (Jacobson).

Although the demographic phenomenon of student turnover was largely beyond the school district's control, the Board did relatively little to alleviate the negative effects of student turnover. Until recently, attempts to achieve conformity among textbooks used in various elementary schools, particularly among geographically proximate Southwest Yonkers schools, were largely unsuccessful; such conformity was initiated in Southwest Yonkers schools only as late as 1978 or 1979. Tr. 4762 (Jamieson); Tr. 13,269 (DeFino); Weiner Dep. 149. In addition, while school officials encouraged relocating parents to keep their children in the school at which they began the school year, no attempts were made to more formally restrict the movement of students among schools even where transfers involved (as they often did) movement between neighboring schools, such as between Schools 3,

10, 18, 19, and King. Tr. 4762-63 (Jamieson); Tr. 13,241-42, 13,268-70 (DeFino). While these circumstances do not lead this Court to the conclusion that the Board's failure to adequately address the problem of student turnover was racially motivated, we have little doubt that its failure to do so, even where feasible, resulted in a significant impairment of the quality of education provided to students in predominantly minority Southwest Yonkers schools.

Many Southwest Yonkers secondary schools were also characterized by a disproportionately high number of student suspensions. School officials were concerned about the disproportionately high incidence of suspensions at a number of Southwest Yonkers secondary schools and the disproportionate number of minority student suspensions throughout the district's schools, and developed a disciplinary code in order to rectify this condition. GX 59-60; Tr. 13, 166-67 (Dodson). School officials recognized that certain schools, particularly Yonkers High School, suffered from an overemphasis on disciplinary, rather than instructional, aspects of the educational process, Tr. 4638 (Robitaille), and that disciplinary problems were in part the result of inadequacies in the educational programs at these schools. GX 604 (Hawthorne); Tr. 4727-28 (Jamieson) (Schools 6, 10, 19). A related problem during the early to mid-1970's involved the inappropriate length of disciplinary sanctions imposed at several Southwest Yonkers secondary schools, a problem which prompted protests by members of the black community and instructions by Superintendent Alioto to James Barrier, his community relations consultant, to ensure that disciplinary guidelines were adhered to by school principals. Tr. 4342-44 (Barrier); GX 559.

An additional characteristic of most Southwest Yonkers schools is their generally more crowded conditions. Particularly since the 1976 closing of three of Southwest Yonkers' twelve elementary schools and the simultaneous elimination of the More

Effective Schools (MES) program in which smaller classes were provided, Southwest Yonkers public schools have been significantly closer to full capacity than their East Yonkers counterparts. By the mid-1970's, the City's segregative pattern of subsidized housing site selection and construction had resulted in the addition of several § 236 family housing projects in Southwest Yonkers, contributing to the steadily increasing minority student enrollment in the area. From 1970 to 1975, minority student enrollments in Southwest Yonkers elementary schools (3,6,7,9,12,18,19,23,King) increased from 2,699 to 2,927 students, despite the fact that all but one (School 19) of these schools changed from K-6 to K-5 during this period, and despite the fact that the decline in birth rates which occurred during the mid to late 1960's was beginning to have an impact on overall school enrollment. GX 126, at 2, 6. The increasing imbalance in school utilization was recognized by the Board's Task Force for Quality Education and by Superintendent Robitaille and his staff, and became one of the foundations for the administration's Phase II reorganization plan. *See* SCHOOLS IV.F.3 *infra*. As result of the Board's failure to adopt Phase II, this imbalance persisted, with notable segregative exceptions (School 6, Longfellow), up to the filing of this action.[110]

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[110]Plaintiffs have submitted evidence of the substantially lower reading and math achievement scores among third and sixth grade students at predominantly minority schools during the 1979-80 and 1980-81 school years. GX 91-93. This evidence, to the extent it confirms that test scores are generally lower in Southwest Yonkers schools, is not controversial. We have difficulty, however, with the purpose for which it is apparently offered, namely, to show that minority students have been denied an equal educational opportunity in Yonkers public schools. Unlike attendance zone changes or school openings, whose numerical and racial impact can fairly readily be evaluated, we have little basis, and plaintiffs have failed to provide this Court with any, for drawing the conclusion that a verifiable correlation exists between the generally lower-than-average academic performance of minority students on achievement tests and the quality and extent of educational opportunities provided by the school district. This is not to say that the aforementioned conditions over which the Board had varying degrees of control did not have a direct and significant impact on the educational

(Footnote 110 continued on next page)

4. Educational Programs and Resources

Considerable evidence has been introduced by both plaintiffs and the Board concerning the nature, extent, and quality of educational programs and curricular offerings available to students at Southwest Yonkers schools. Briefly stated, the Board has attempted to establish that the provision of federally and locally funded and Board-created special remedial programs at Southwest Yonkers schools is evidence both of the equality of educational opportunities in the district as well as the absence of intentionally created inequalities (to the extent that inequalities do exist). Plaintiffs have sought to establish that despite the

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(Footnote 110 continued from previous page)

opportunities available to minority students, or that student achievement levels did not have some effect on the community's perception of the quality of education at a particular school. However, we are cognizant of the degree to which other factors over which the Board lacks control, such as socioeconomic factors, have been recognized as having a significant influence on student achievement levels — a correlation recognized not only by education and sociological experts, Tr. 12,329 (Armor), but also by Yonkers school officials themselves. *See, e.g.*, GX 518, 604, 609; P-I 10-74; SB 654. In the absence of concrete and similarly persuasive evidence demonstrating the accuracy and statistically meaningful nature of the purported correlation between achievement test scores and the conduct of Yonkers school officials, we are unwilling to conclude on the basis of minority students' lower achievement test scores that such students have been denied the educational opportunities afforded other students in the district. *See Bell* v. *Board of Education, Akron Public Schools*, 491 F.Supp. 916, 941 (N.D. Ohio 1980), *aff'd on other grounds*, 683 F.2d 963 (6th Cir. 1982).

The Board, on the other hand, also introduced evidence with respect to student achievement test scores. Dr. Armor analyzed fall 1981 and spring 1982 Metropolitan Achievement Test Series reading and math scores of fourth, sixth and eighth grade students by race and by socioeconomic status, and charted the rate of progress for these students by comparing their performance on these tests. Relying on the correlation between socioeconomic status and educational achievement, Dr. Armor then adjusted the achievement test scores for each student according to their socioeconomic level. Based on this analysis, Dr. Armor concluded that the achievement level of minority students in predominantly (over 55%) minority schools was equal to or greater than the achievement levels of minority students in racially balanced (25-55% minority) or predominantly white (under 25% minority) schools, after controlling for the socioeconomic status of all students. Tr. 11,990-12,000 (Armor); SB 810.11-810.13.

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additional resources provided by the Board, curricular inequalities nevertheless exist in Southwest Yonkers schools and that additional resources have failed to ameliorate the detrimental impact

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We have difficulty both with particular aspects of this analysis and with its broader implications. As an initial matter, we may assume the validity of the correlation between socioeconomic status and student achievement upon which Dr. Armor's analysis relies. We note, however, that the negative impact of certain socioeconomic factors is not entirely beyond the ability of school officials to alleviate. For example, while student mobility caused by residential relocation is a demographic phenomenon largely unrelated to Board acts or omissions, the Board was not without some ability to limit the educationally detrimental consequences of this phenomenon. *See* SCHOOLS IV.B.3 *supra*. Thus, to the extent that reliance on the correlation between socioeconomic status and student achievement carries with it the implication that school officials are powerless to either ameliorate or exacerbate the educational consequences of certain socioeconomic variables (thus factoring them out of the analysis), the analysis is somewhat misleading.

The underlying implications of the analysis are more disturbing. Various inadequacies in educational conditions at Southwest Yonkers schools and their impact on the quality of the educational process at these schools have been recognized by Yonkers school officials themselves and have been established to this Court's satisfaction. Just as lower test scores tell us little about the extent and success of the efforts of school officials to provide meaningful and equal educational experiences to all students, we have similar difficulty accepting the notion that higher socioeconomically-controlled test scores among minority students in racially imbalanced schools necessarily compel the conclusion that tangible and intangible educational inadequacies extant in Southwest Yonkers schools somehow either did not exist or did not impact negatively upon the students at these schools. Our task as we perceive it is to determine whether the Board failed to provide equal educational opportunities for Yonkers public school students, why that failure occurred, the measures taken by the Board to alleviate the inequalities which existed, and the explanations for and the legal consequences of the Board's acts and omissions — not whether minorities may have overcome the inequalities that existed in the district, or whether the existence of higher achievement test scores among minorities in segregated schools somehow establishes the legality or educational superiority of such an environment. Assuming that the racial segregation in Yonkers public schools has been deliberately created or maintained by acts and omissions of the Board, we fail to see how superior performance on achievement tests by racially segregated minorities precludes this Court from ordering the eradication of such segregation.

of the other inequalities in educational opportunities and resources provided by the Board.

Since the mid-1960's, the Board has annually received federal funds specifically designated for schools which have low achievement levels and are located in low-income areas. These federal programs provide eligible schools with monetary resources over and above the school's annual budgetary allotment, and have resulted in additional remediation and enrichment programs, additional staffing, and in some instances additional equipment and supplies, in predominantly minority Southwest Yonkers schools. Elementary schools have been the primary recipients of these additional resources.

During the 1960's, the primary federally funded remedial education program in Southwest Yonkers schools was Project Orbit. The purpose of Project Orbit was to provide students in eligible schools with additional remedial instruction in reading and math. Project Orbit provided eligible schools with reading and math labs, additional books and supplies, and additional staff to complement regular classroom instruction and to provide more individualized instruction to participating students. During the late 1960's, Project Orbit also provided funds for summer programs in reading and science for students in Project Orbit schools.

Project Orbit was replaced in the early 1970's by federally funded Title I programs. *See* 20 U.S.C. § 2701 *et seq.* Like Project Orbit, Title I funding resulted in additional reading and math programs and individualized instruction at schools with low-achieving, low-income students. At various times during the 1970's, Title I funds were used to establish a number of other educational programs geared toward students in Southwest Yonkers' predominantly minority schools. SB 746. For example, a bilingual program for the district's hispanic students was provided at Schools 10, 18, and 19 and at Hawthorne Middle School (the

district's most heavily hispanic middle school). Tr. 11,183-84 (Guerney).[111]

A variety of other locally funded supplementary educational programs were established at Southwest Yonkers schools during the 1960's and 1970's. The More Effective Schools (MES) program, for example, provided students at Schools 6, 10, and 12 with an opportunity to receive more individualized supplementary instruction from additional staff, until the elimination of this program in 1976 as part of the school district's budget reductions. Tr. 10,981 (Jacobson); Schainker Dep. 110; SB 653. Programs for high-achieving students were also established at a number of Southwest Yonkers schools, for example, the High and Wide program at School 18 and the AIM (Alternatives for Instructionally Motivated) program at School 10. Tr. 11,191-92 (Guerney). During the late 1960's to mid 1970's, the district established a Home With Books reading program (later called Reading Improvement Service Everywhere, or RISE) in School 7 in which volunteers from the community worked with students in an effort to improve their reading skills. The program was highly regarded by Superintendent Mitchell and was eventually extended to eleven schools in the Southwest Yonkers area. Tr. 13,347-51 (Pistone); SB 89.

The infusion of additional resources into Title I schools was not a complete panacea for all the educational and curricular difficulties which existed in Southwest Yonkers schools. A number of elementary schools still suffered from inadequacies in the quality and extent of instructional materials which were available.

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[111]Prior to receiving Title I funds in any given year, the district was required to submit a comparability report to the Title I Regional Program Office of the New York State Education Department, demonstrating that instructional materials and supplies available at Title I schools were comparable to materials and supplies at non-Title I schools. These comparability reports were reviewed and accepted by the Regional Office for the years 1976-80. Tr. 13,523-24 (Stipulation); SB 817-821.

Tr. 13,500 (Steinberg); P-I 19-33 (School 19); GX 475, 476 (School 6), GX 526 (School 7). While these inadequacies were not universal in nature — King Elementary School, for example, was recognized as having a wealth of quality instructional materials and supplies (Tr. 12,721 (DeFino)) — a review of the numerous budgetary requests and school descriptions in evidence reflects the generally more serious and frequent nature of these particular inadequacies at Southwest Yonkers schools. The open school educational program at School 10, though designed as an innovation in educational instruction which would improve the prospects for racial integration at the school, instead was beset with a number of difficulties, including the loss of its originally planned recreational space and the frequent turnover of its instructional and administrative staff, which detracted considerably from the quality of the educational opportunities available at the school. These difficulties were not only perceived by parents in the community, who resisted the potential reassignment of their children to School 10, but were recognized by school officials as well. Tr. 4620-26 (Robitaille); Tr. 4777-84, 4788-94 (Jamieson); Tr. 5007-08 (Jacobson). In addition, the remedial programs provided at Southwest Yonkers schools did little to alleviate the inequalities in school facilities, staff experience and turnover, and student mobility, all of which impacted on the quality of educational opportunities, including special remedial programs, available at these schools. The record supports the conclusion that the Board did not deliberately fail, for partly racial reasons, either to provide remedial or other special instructional programs or to fairly allocate its programmatic resources among the district's white and minority schools. *Cf. Berry* v. *Benton Harbor*, *supra*, 442 F.Supp. at 1306. The record is also consistent, however, with the conclusion reached by Board members Jacobson and Siragusa, as well as Assistant Superintendent Schainker, that Southwest Yonkers schools were educationally inferior despite the additional programmatic resources that were infused into

those facilities. Tr. 5035, 10,959-61 (Jacobson); Schainker Dep. 106-10; Siragusa Stip. ¶ 3.

The additional resources provided by the Board at Title I schools also did not cure the educational program deficiencies at West Yonkers secondary schools. Commerce and Hawthorne Middle Schools both suffered during the early to mid-1970's from inadequacies in their reading programs, a problem which a 1972 New York State Department of Education study found to exist in a number of Southwest Yonkers schools, GX 499, at 43,700 (finding "serious unevenness" in quality of reading programs, with ineffective programs at inner-city schools), and prompted Superintendent Alioto to make the improvement of reading programs and reading achievement levels the educational priority of his superintendency. The Commerce reading program was considered the worst in the district partly because of teacher ineffectiveness, GX 564; Tr. 13,312 (Cantor), and led, along with other instructional and facility-related problems, to the creation of a special task force to investigate and develop solutions for the various educational problems at the school. GX 559, 561. While some modest instructional improvements (for example, a program for gifted students) were made during Commerce's last year in operation, the school was generally regarded by school officials as an educationally troubled school throughout its brief three-year existence. Hawthorne also suffered from teacher-related inadequacies in its reading program and a lack of advance subjects available at other middle schools, two problems which contributed to the school's poor image among school officials and community members alike. Tr. 13,501-04 (Steinberg); GX 601. Once again, school officials made an effort to implement corrective measures for educational problems similar to those which had existed at Commerce. Tr. 12,687-90 (DiChiaro); GX 604. Efforts were made to improve instructional and programmatic offerings at the school, for example, the Plus Program, a remedial reading and math instructional program; an honors foreign language program; a Regents algebra course for gifted children; and Target Success,

a human relations program at the school. Tr. 12,621-23. These efforts have been followed by a notable improvement in the achievement levels at the school.

Similar disparities in educational programs have existed among the district's high schools as well. Roosevelt High School has long been considered a high school of high educational quality, with Lincoln High School in Southeast Yonkers also enjoying at one time a reputation as an academic "elite" school. Tr. 5061 (Jacobson); Tr. 10,991-92; Jungherr Dep. 8; Natella Dep. 63-64; Schainker Dep. 96-97. These reputations have developed not only as a result of the quality of the educational opportunities available at these schools but also as a consequence of the significant program inadequacies at the district's two West Yonkers high schools.

The educational problems afflicting Gorton High School, discussed elsewhere in these findings, *see* SCHOOLS IV.F.2 *infra*, stemmed in significant part from the inferiority of its non-academic, non-occupational "general" program. While the race-related disturbances of the late 1960's and early 1970's subsided by 1974 or 1975, both the causes and consequences of these disturbances have survived to a certain extent. GX 598. The district has made some modest efforts to improve the educational opportunities at the school: auto and industrial arts programs were developed as a result of the 1973 Reorganization Plan; a three-year (1973-76) National Humanities Foundation (NHF) grant expanded cultural opportunities and increased individualized instruction at the school, Tr. 13,532-35 (Richards); SB 822; and by 1978 Gorton offered the full range of Regents and advanced placement courses available at the district's East Yonkers high schools. *See* Stipulation of the Parties Concerning Course Listings at Roosevelt, Lincoln, Gorton, and Yonkers High Schools During 1978-1979 School Year. Nevertheless, the rejection of the NYU Report's more comprehensive reform proposals (proposals based in part on the inadequacy of Gorton's general program —

see SCHOOLS IV.F.2 *infra*) and the remaining inequality in some course offerings (particularly English and social studies electives), along with the previously discussed disparities in educationally related characteristics of the district's high schools, have resulted in the perpetuation of Gorton's comparatively less favorable status as an educational institution.

Yonkers High School has also suffered from similar inadequacies in its educational program. In the late 1960's, the inadequacy of the school's general program was protested by the Yonkers PTA and was recognized by school officials as well. GX 619, 645; Tr. 2445-46 (Guzzo). The school also suffered from a high rate of teacher absenteeism and what school officials characterized as general staff ineffectiveness. GX 621. These problems, combined with the continued use of the inadquate Linden Street facility pending the long-awaited construction and completion of the new Yonkers High School building, resulted in students receiving a generally less adequate educational experience than was available at East Yonkers high schools.

In September 1973, ninth grade students from Hawthorne and Longfellow Middle Schools were reassigned to Yonkers High School in accordance with the district's 1973 grade reorganization, thus increasing the already substantial overcrowding at the school. Becasue of the overcrowding and the infeasibility of transferring students to the district's other similarly overcrowded high schools (Lincoln High School in Southeast Yonkers was approximately 263 to 365 students above the capacity figure used in the NYU Report), the new Yonkers High School was opened February 1974, prior to the completion of the building's construction. Tr. 12,899-901 (Dodson).

The high school's educational problems did not disappear after the opening of the new Yonkers High School facility. In addition to the school's curricular inadequacies, the district initially encountered significant administrative difficulties with the new but unusually large facility, leading to student disturbances

both inside and outside the school. GX 624-626. Emphasis was placed on maintaining discipline, with a concomitant failure to develop adequate educational programs for students at the school. Alioto Dep. 110; Tr. 5240 (Morris). Even disciplinary order was somewhat lacking due in part to the reluctance of teachers to discipline male black students. Schainker Dep. 116-17, 252-53; Tr. 2457-58 (Guzzo); GX 637. Instructional and curricular inadequacies were recognized by several school officials as a significant problem contributing to the disruptive atmosphere at the school. *See* Alioto Dep. 50-51; Tr. 2460-61 (Guzzo); GX 627.

The curricular and administrative difficulties at Yonkers High School lead to the creation of a special task force in October 1974. After working for several weeks on a full-time basis at the school in an effort to address these problems, the task force concluded that the school suffered from significant inadequacies in its organizational structure, its teaching staff and guidance department, and its instructional program. GX 637. As a result of the task force's evaluation of the school's operations, a new organizational structure was created with overall administrative responsibilities delegated to a coordinating committee comprised of the school's principal and three members of the district's central administrative staff. GX 628. Dr. Edward Vollbrecht, Director of Secondary Education and a member of the coordinating committee, also acknowledged the need to address the curricular deficiencies at the school. GX 631 ("Major problem is in course offerings not administrative organization of school."). The aforementioned difficulties were followed by a significant decrease in Yonkers High School's white student enrollment and hence an increase in its percentage minority enrollment. GX 64; *see also* GX 624.

While the initial organizational difficulties associated with the opening of the new facility subsided, other educational and curricular inadequacies persisted throughout the 1970's. During the late 1970's, the school's principal, Joseph Farmer, repeatedly

noted the student management problems at the school, including disciplinary and mobility-related problems and high teacher absenteeism, the latter of which led to the use of the library as a holding facility for otherwise unsupervised classes. In addition, Farmer recognized the continuing need to improve the curricular offerings at the school, including the expansion of occupational education alternatives for students who were either uninterested in or incapable of attending Saunders. GX 632, 634, 635; *see also* Tr. 4638 (Robitaille). By 1980, at which time the school had become predominantly minority in its student enrollment and continued to be disproportionately minority in its teaching staff, the school's program offerings had improved, with occupational educational and industrial arts courses substantially comparable to those available at other high schools in the district. Nevertheless, Yonkers High School's reputation in the community has remained one of educational inferiority as compared to the district's other high schools. Hicks Dep. 59; Tr. 5308 (Frauenfelder).

5. Integration and Educational Opportunity

The disparities in educational opportunities provided in Yonkers public schools have had two significant race-related consequences. First, the disparities in the quality of educational programs and facilities have combined with the school system's racial imbalance to reinforce the already existing residential segregation in the city. The link between the quality of education at particular schools in Yonkers and residential housing choices is well-established: this relationship was recognized by parents, GX 203, 276, and principals, GX 551, was testified to by realtors, Tr. 2744-49 (Downes); Tr. 11,773-74 (O'Keefe), and even affected the housing choice of the 1975 Acting Superintendent of Schools. Jungherr Dep. 8. *Cf. Higgins* v. *Board of Education of Grand Rapids, supra*, 508 F.2d at 788. Similarly, the link between the racial identifiability of a school and the residential segregation of the surrounding neighborhood has been recognized by both

courts and City officials. *See* SCHOOLS V.A., V.E.1 *infra*. The relative inequality in educational opportunities available at Southwest Yonkers predominantly minority schools has contributed to the identification of minority schools in Yonkers as educationally inferior schools, with the two characteristics becoming virtually inseparable. This confluence of racial identifiability and relative educational opportunity has served to reinforce the segregative demographic patterns which have evolved in the City.

Second, the equalization of educational opportunites and the alleviation of racial imbalance in Yonkers public schools were not unrelated goals. Rather, as racial imbalance worsened and educational disparities persisted, various school officials recognized that the elimination of the former was an important step in eliminating the latter. The value of racial integration was not based solely on the social and educational benefits to be derived from the physical juxtaposition of white and minority students, or the "melting pot" aspect of such integration, *e.g.*, Tr. 4072 (Sobel); Tr. 5449-51 (Siragusa); GX 892 (1972 Operation Outreach report by Board health education employees noting existence of significant racial prejudice among students in all-white and all-black schools and absence of such prejudice at School 5 (14% minority), School 23 (17% minority), and School 24 (24% minority), three of the district's four most racially balanced elementary schools). Instead, the disparities in school facilities, student enrollments (as a percent of capacity), teacher experience levels and expectations, and secondary school curricular offerings were problems which were likely to persist absent some desegregative technique which would have helped to reduce or eliminate some or all of these disparities. Consistent with these race-related considerations, three school superintendents, the Board's Task Force for Quality Education, New York State education officials, and other Yonkers school officials concluded that the equalization of educational opportunities and the elimination of racial segregation in Yonkers public schools were interrelated goals. Tr. 2487 (Guzzo); Tr. 4065-73 (Sobel) ("had the schools been desegre-

gated many of these conditions [disparities in physical facilities, staff experience, and curriculum completion, and lack of interracial contact] would have been alleviated"); Tr. 4325 (Barrier) (re Superintendent Alioto); Tr. 4671-77 (Robitaille); GX 123, at 2 (same) ("quality education for all children ... cannot be accomplished without integration"); Tr. 5203 (Morris) (re Superintendent Mitchell) (recalling statements by Superintendent Mitchell that Yonkers children could not be getting equal education as long as they were segregated); Tr. 5385-90 (Tobin); Tr. 5450-52 (Siragusa) ("[S]eparate and equal ... is [not] a possibility in our particular case. I am not talking about any place anywhere else."); Tr. 12,977-78 (Dodson). It is in this light that the Board's repeated failure to implement educational and desegregative school reorganization plans must be evaluated.

C. Vocational Education: Steering and Screening of Minority Students

Prior to 1974, the Yonkers School District operated two specialized high schools, the High School of Commerce and the Saunders Trades and Technical High School (Commerce was closed in 1974). Until 1980, Saunders was located in the Getty Square area in the heart of downtown Southwest Yonkers. Commerce was located several blocks north of Saunders, also in Southwest Yonkers. The enrollment at these schools was and is not limited by attendance zone boundaries but is districtwide; students from all over the city are permitted to attend the schools. Nevertheless, Saunders' geographic location has contributed to the fact that most of its students lived in West Yonkers. GX 645; P-I 45-156.

Saunders is generally regarded as a school for students who are interested in entering a particular trade or technical field. Although until recently the enrollment at Saunders was exclusively male, the school is currently open to members of both genders. The Saunders curriculum consists of a variety of voca-

tional and technical course offerings, in addition to traditional academic subjects. Vocational, or industrial, courses include auto mechanics, carpentry, electricity, machine shop and printing; technical course offerings include architectual design and technical electricity. GX 680. The Saunders program is designed to prepare students for college education as well as provide them with skills which will enable them to move directly into the labor force upon graduation.

The High School of Commerce, whose student population was largely female, offered a variety of specialized commercial or business courses, such as bookkeeping, clerical practice, office machines, and secretarial practice, as well as courses in cosmetology, dressmaking, food trades and retailing.

During the 1930's to 1950's, the reputation of Saunders and, to a lesser extent, Commerce, was unfavorable. Saunders was known as the "dumping ground" for students who were perceived to be generally less capable of performing in a normal academic program. Tr. 4965 (Jacobson); Alioto Dep. 36; Natella Dep. 10-11. A 1934 study of the Yonkers public schools by Teachers College concluded that Saunders was used as a school for academically retarded pupils who were assigned to junior high school industrial courses with the tacit understanding that they would attend Saunders. SB 12, at 235. This reputation was fairly well known by both students and school officials in Yonkers as a matter of general reputation and via complaints by black parents to school officials.

A number of plaintiffs' witnesses testified that, as black students in Yonkers during this period of time, they were encouraged by guidance counselors to enroll in the vocational programs at Saunders and Commerce. According to Dr. Henry Williams, Saunders was recommended based on its less academically demanding program and because it would make black students more readily employable, Tr. 2640-41 (Williams), an explanation which was given in support of attendance at Com-

merce as well. Tr. 3519-20 (Ross). In some instances, students were encouraged to attend Saunders or Commerce even though the student had expressed a preference for an academic high school program. Tr. 2675-79 (McRae); Tr. 3516-24 (Ross). A 1959 report by the Board's Advisory Board on Vocational Education also described a process of "[p]sychological bludgeoning" of students whereby they were told that they would be left back unless they agreed to transfer to one of the district's vocational schools. GX 663, at 5; *see also* Natella Dep. 10-11. The report also noted that hard-to-teach students would be "unloaded" at Commerce in a similar manner. *Id.* at 6. A number of students were able to avoid enrollment in an undesired vocational program only after their relatives intervened on their behalf. Tr. 2679-80 (McRae); Tr. 3521-24 (Ross).

Although racial enrollment data for Saunders and Commerce is not available for years prior to 1967, the testimony at trial suggests that the schools' minority enrollment was substantial. For example, Winston Ross recalled that during the 1950's a significant number of Runyon Heights students attended Saunders or Commerce rather than the virtually all-white Roosevelt High School in East Yonkers. Tr. 3667; *see also* Tr. 2683-84 (McRae). Several witnesses also testified that this "steering" process was experienced by them personally and by their fellow black classmates. Tr. 2639-43 (Williams); Tr. 2683-85, 2709-10 (McRae). Dr. Williams recalled that this persistent encouragement of Saunders' trade programs to black students was at variance with the advice given to academically undistinguished white students at that time. Tr. 2651-52, 2665-67.

One Board witness, Joseph Guerney (who is white), testified that he also was encouraged by a guidance counselor to attend Saunders because of his siblings' prior attendance at the school and his family's purported financial inability to send him to college. However, other white witnesses testified that, as white students attending school at or about this time, they either did not

meet with school officials prior to entering academic high school programs or were not advised to attend the non-academic high schools for reasons of, among others, prior academic achievement or family tradition. Tr. 4442 (Radko); Tr. 4966 (Jacobson). Thus, even if "steering" of students to Saunders and Commerce was not exclusively based on a single, racial criteria, it appears from the record that black students were fairly frequently the subjects of such treatment and experienced a form of counselling not typically experienced by white students. No statistical data was introduced, and apparently is not available, concerning the number of students who were affected by this process or the extent of its disproportionate impact on blacks. However, the testimony of then-students of Yonkers public schools suggests that blacks were the more frequent recipients of such treatment.

A similar process of steering black students also occurred with respect to particular programs within individual high schools themselves. One practice involved advising or encouraging students to enroll in a high school's general, or social-civic, program, a program geared generally for non-college bound students, instead of the regular academic, or Regents, program. Again, although statistical information is not available, the testimony suggests that blacks were enrolled in greater numbers in the general, rather than the academic, program. Tr. 2622-33 (Mareno). Several witnesses recalled their experiences as black students being advised to enroll in the social-civic program at particular schools. Tr. 2595 (Mareno); Tr. 2641-43 (Williams); Tr. 4300-01 (Barrier); Peace, Jr. Stip. ¶¶ 7-9. These students were either not advised of the alternative of enrolling in the academic program, Tr. 2597-98 (Mareno), or were encouraged to take the social-civic program despite stated preferences for the academic program. Tr. 2644-65 (Williams); Tr. 4300-01 (Barrier). In one instance, black students were forced to wait in the principal's office at Roosevelt for a number of days and were encouraged to attend Gorton High School before being allowed, with the help of parental intervention, to attend classes at

Roosevelt. Tr. 2724 (Downes). Once again, black students often were permitted to enroll in the academic program only after the intervention of their parents on their behalf. Tr. 2645 (Williams); Tr. 4301 (Barrier). Peace, Jr. Stip. ¶¶ 7-9. Black parents testified that their children encountered similar impediments as well. Hamilton Dep. 69-71.

Many of the aforementioned witnesses have gone on to achieve considerable success in their career endeavors. While this may, at first blush, indicate that their experiences as black students in the 1930's through 1950's were educationally inconsequential, a more persuasive inference is that their success was achieved in spite of, rather than because of, the aforementioned "steering" which they experienced as students in the Yonkers public schools. In any event, the extent of their individual achievements in no way ameliorates the discriminatory treatment to which they were subjected during this period of time.

The probative force of these practices, in terms of current segregative impact, is somewhat limited, particularly since Saunders' reputation as a "dumping ground" has been long discarded, and the High School of Commerce has since been closed. The "steering" of blacks into general and vocational programs is nevertheless relevant insofar as it is evidence of the early existence of a pattern of discriminatory treatment to which minority students have been exposed over time in the Yonkers public schools.[112]

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[112]While we recognize that the above practices predate the Supreme Court's decision in *Brown* v. *Board of Education*. The temporal remoteness of these discriminatory practices, especially in view of their subsequent segregative effect, does not undermine their legal relevance. *See Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 210-11; *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 913.

We reject the Board's argument, stated in general terms but with particular relevance here, that it cannot be held liable for individual acts of employees (principals, guidance counselors, teachers) as not being pursuant to official policy of the Board. Assuming that the § 1983 principles upon which the Board relies govern the liability of a school board in a school desegregation case

(Footnote 112 continued on next page)

The inferior reputation of Saunders and Commerce was fairly dramatically altered when, in 1958, the Board decided to establish entrance requirements for vocational programs at these schools. According to the standards eventually adopted by the Board in 1962, students were to be accepted into Saunders and Commerce up to the available capacity of the schools' facilities. In the event a particular program had more applicants than its available capacity would permit, students were to be selected based upon a ranking determined by the receiving school. This ranking was based on a student's grades, achievement and aptitude test scores (with particular emphasis on math and reading scores), and the recommendations of guidance counselors. Students who were unable to secure admission to Saunders at the ninth grade level, during which time Saunders students would participate in an exploratory program at the school, would be invited to reapply the following year.

(Footnote 112 continued from previous page)

brought under Title IV and Title VI, *cf. Rizzo* v. *Goode*, 423 U.S. 362, 377 (1976) (distinguishing school desegregation cases, in which board members' and administrators' own conduct resulted in racial segregation of schools, from § 1983 police misconduct case in which discriminatory acts of police officers were not traceable to unlawful policy of high-ranking police officials), the Board's conduct is nevertheless sufficient to give rise to legal responsibility for the discriminatory operation of the school district's vocational program. The Board's liability is not predicated on a theory of *respondeat superior*, rather, the Board specifically delegated decision-making authority to Board employees, and was aware of and acquiesced in the discriminatory consequences of their acts with respect to the operation of vocational programs in the Yonkers public schools. The Board's liability is thus not predicated on an isolated instance of unauthorized discriminatory conduct by an employee against an individual victim, *see Turpin* v. *Mailet*, 619 F.2d 196 (2d Cir.), *cert. denied*, 449 U.S. 1016 (1980); *Owens* v. *Haas*, 601 F.2d 1242 (2d Cir.), *cert. denied*, 445 U.S. 980 (1979), but on the Board's conduct in the face of a pattern of discriminatory acts and omissions over time. Particularly since this pattern was consistent with the Board's own adherence to segregative practices elsewhere in the district at that time, *see* SCHOOLS IV.A.3.a *supra*, SCHOOLS IV.E. *infra*, the Board's inaction provides an even stronger basis for holding it legally responsible for the discriminatory conduct of its employees. In addition, the continued adherence to the Saunders screening criteria during the 1970's despite an awareness of its segregative consequences was a decision for which the Board and high-ranking school administrators, not school-level employees, were primarily responsible.

The implementation of screening standards for Saunders and Commerce was not universally supported. Specifically, the Yonkers High School PTA expressed its concern to Superintendent Wynstra that former Saunders and Commerce students who failed to gain admission to these schools and would instead be attending Yonkers High School would be "discriminat[ed] against . . . by sheer neglect" because of the lack of adequate programs at the school. GX 647. Wynstra assured concerned community members that adequate provisions would be made for such students. GX 653.

The Saunders admission process was essentially two-tiered. Initially, guidance counselors at the district's junior high schools would solicit students who were interested in the Saunders program by taking them on a tour of the Saunders facility. Applications were then made available to students interested in applying to any of Saunders' vocational programs. After applications were submitted by interested students, guidance counselors would gather the aforementioned academic and testing information concerning each applicant. The counselor would sometimes, though not always, include a personal recommendation for the applicant. The application did not specifically indicate the applicant's race, but included the applicant's name, address, junior high school and guidance counselor's personal recommendation.

The completed application was then forwarded to Saunders for a determination as to admittance. Saunders' guidance counselors made initial recommendations regarding admissions based on the aforementioned information and, in some rare instances, personal interviews. The principal of Saunders maintained authority to make the final decision as to admissions. Students were notified of the admission decision and, if rejected from the ninth year program, were permitted to reapply the following year.

At Saunders, admission decisions were generally made along the lines noted previously, *i.e.*, an examination of program capacity, the number of applicants, and each student's academic

qualifications and individual guidance counselor recommendations. There was also testimony that indicated that the admissions process was somewhat more flexible than it appeared on paper. Part of the evaluative process engaged in by school officials was an inquiry into an applicant's behavior. Specifically, junior high school guidance counselors were instructed that students who were considered disciplinary problems were inappropriate candidates for admission to Saunders. Tr. 13,389, 13,413-16 (Zaroff); Alioto Dep. 35; Schainker Dep. 32. In addition, some students were accepted on the basis of "special circumstances" or political influence; Angelo Paradiso, Saunders' principal from 1964 to 1973, would simply direct Saunders guidance counselors to admit such students in addition to those who had already been selected.

The objective criteria relied upon by guidance counselors at Saunders were less than well-suited to the task for which they were used. School officials relied upon a variety of standardized tests, such as the Differential Aptitude Test, the Stanford Achievement Test, and the Otis-Gamma IQ Test, which were found in 1972 and 1973 to be outdated or otherwise considered inappropriate as measuring devices of student ability. GX 517, 662. Although the use of some of these tests was discontinued in the late 1960's to early 1970's, at least one (the Stanford Achievement Test) was apparently still in use as late as the 1977-78 school year. GX 661. Notwithstanding the use of these objective screening standards, the academic capabilities of Saunders' students were by no means entirely consistent with the school's reputation as a superior educational institution. During the late 1970's, students at Saunders were recognized as suffering from serious deficiencies in both reading and math skills, a problem which was addressed by remedial instruction. Tr. 12,838-39 (Marra). And although the aforementioned screening criteria were invoked only when the number of applicants exceeded Saunders' program capacity limits, the school's favorable reputation made the admissions process a fairly competitive one. The evidence thus suggests that the criteria used for selecting appli-

cants to Saunders were in fact relied upon in making admission decisions. GX 674 (approximately 60% of applicants accepted from 1971-73); Alioto Dep. 101-02.

The late 1960's and early 1970's were also marked by increasing dissatisfaction with the Saunders facility itself and a rapidly increasing enrollment at the now highly regarded school. The physical inadequacies of the school, by far the oldest and smallest high school in the district, had long been recognized by school officials. These inadequacies contributed to a 1968 proposal to close Saunders and Commerce and to construct a new facility for the district's occupational, vocational, and technical programs. GX 645, at 53-55, 165-67. In 1973, the district again considered proposals to close both Saunders and Commerce and to distribute their programs throughout the district's other high schools. GX 115. In March 1973, the Board decided to close Commerce and decentralize its occupational programs; on the other hand, it decided to maintain Saunders as a self-contained facility and to expand its occupational course offerings to include some of Commerce's technical programs. GX 114. By 1974, school and City officials were actively engaged in finding a suitable site for the location of a new Saunders facility.

The capacity of the Saunders facility was recognized as increasingly inadequate. The facility was considered capable of enrolling anywhere from 600 (NYU Report) to 875 (Engineering Department) students, or approximately one-half the capacity of Gorton, the district's smallest regular high school. Despite the increasing popularity of the Saunders program, no physical additions were made to the facility after 1964. GX 644; Tr. 13,408 (Zaroff). Superintendent Alioto recalled that in the early 1970's, the Saunders auditorium had been subdivided for use as additional classroom space. Alioto Dep. 101.

Saunders' limited capacity, however, did not prevent a steady increase in its student population. In 1969-70, Saunders' enrollment was 483; this figure increased steadily during the 1970's,

reaching a maximum of 831 in 1975-76 and remaining above 800 students until just before the relocation of Saunders in 1980.

This increase in student enrollment during the early to mid 1970's was largely devoid of black students. While enrollment at Saunders increased by 155 students between 1971 and 1975, the number of black students rose by only two. GX 64. During this period, the disproportionately low number of blacks at Saunders became increasingly evident. In 1969-70, Saunders was 2.7% black (versus 9.1% districtwide high school average); in 1972-73, Saunders was 3.8% black (versus 11% average); by 1975-76, Saunders was 4.2% black (versus 16.1% average). This disproportion was even more noticeable when compared to the geographically proximate West Yonkers high schools: in 1972-73, Gorton and Yonkers were 21.3% and 20.3% black, respectively; by 1975-76, the schools were 25.8% and 32% black, respectively.[113]

In addition to the above screening process, two factors contributed to the disproportionately high number of whites and low number of blacks at Saunders. A large number (approximately 80%, according to Reginald Marra, principal of Saunders beginning in 1974) of Saunders' white students came from the Southwest Yonkers area, and approximately one-third came from parochial schools in that area. The return of these students to the public school system, as well as the enrollment of public school students at Saunders, was due not only to Saunders' favorable reputation but also to the undesirability of attending either Yonkers or Gorton High School, two West Yonkers high schools with considerably higher percentage minority enrollments than Saunders and perceived to be educationally inferior to the district's other high schools. Gorton was also experiencing race-related

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[113]Hispanics were not similarly represented in disproportionately low numbers. During the eight year, 1969-77 period, hispanics were represented at Saunders in a percentage equal to or greater than the districtwide high shool average for six of those years. Hispanic enrollment at Saunders was disproportionately low only in comparison to hispanic enrollment at Yonkers High School.

disturbances at that time, an additional factor leading to the increased enrollment of white Southwest Yonkers students in the Saunders program. GX 674.

Another reason for the low minority enrollment at Saunders related to the school's prior reputation in the community. According to Robert Dodson, school principal and administrator, and Herman Keith, Yonkers NAACP President and Advisory Council for Occupational Education[114] member, minority students were reluctant to enroll at Saunders because of the school's previous reputation as a dumping ground for minority students. Tr. 8522-23 (Keith); 13,008-09 (Dodson). This problem was exacerbated by a lack (until recently) of affirmative recruitment efforts designed to attract more minority applicants to the school, and inadequacies in the procedures (again, until about 1977) for informing students of the status of their applications and for reminding rejected eighth grade applicants of the opportunity to reapply the following year. GX 665, at 40,560; P-I 75-25, at 39,199.

Saunders' identifiably white character was also evident in its faculty and administrative staff. Between 1968-69 and 1975-76, Saunders never had more than two minority faculty members and was consistently below the districtwide average minority faculty percentage. During these years, Gorton and Yonkers High Schools, the district's two West Yonkers high schools, consistently exceeded the districtwide average for minority faculty. For example, in 1974-75, at the height of Superintendent Alioto's minority faculty recruitment efforts, Gorton had ten minority faculty members (10.3% of its staff) and Yonkers had twenty-one (14.2%); Saunders had only two (3.6%). In each year during the

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[114]The Advisory Council for Occupational Education was created pursuant to a state-imposed requirement for school districts that receive Vocational Education Act funds. The sixteen-member council consists of persons from various business and community organizations and advises the Board on policy matters relating to occupational education. P-I 75-25.

1969-76 period, Yonkers or Gorton (or both) had at least one minority principal or assistant principal; Saunders had no minority principal or assistant principal during this period of time.

School officials were aware of and concerned about the fact that Saunders, located in the most heavily minority area of the city, was becoming an increasingly white school. Superintendent Alioto recognized that the school's selection process "appeared to systematically exclude minority youngsters," Alioto Dep. 35, a conclusion reached by other school district officials as well. Schainker Dep. 32-36; Tr. 5511 (Minervini). The limited presence of minorities at Saunders was coupled with the recognized inadequacies of occupational programs at the district's regular high schools, a problem which the district slowly began to address subsequent to its rejection of the 1972 NYU Report's more far-reaching proposals.

The High School of Commerce, on the other hand, did not suffer from similar disproportionality in its minority student enrollment. Although the selection process at Commerce was governed by substantially similar admissions criteria, GX 655, 657, minority enrollment at Commerce was consistently higher than the districtwide average:

Year	% Minority, Commerce	% Minority, All High Schools
1967	12	9
1970	14	12
1973	19	16

Although evidence concerning the Commerce admissions process is scant, it is reasonable to infer from these figures that the Saunders admissions process was considerably more competitive and was influenced to a greater extent by the student behavior-related criteria described above.

During the early 1970's, limited efforts were made to increase the availability of occupational and vocational programs to

minority students. In 1973, the Board voted to close the High School of Commerce and establish a limited number of occupational programs at other high schools in the district. Other, more comprehensive proposals, such as the NYU Report's recommendation to close Saunders and decentralize vocational instruction programs throughout the district's high schools, were rejected. In addition, simultaneous attempts were made to revise the admissions criteria for Saunders. In the early 1970's, Superintendent Alioto and Assistant Superintendent Schainker met with Angelo Paradiso, Saunders' principal, to discuss the lack of minorities at Saunders and the admissions procedures being used at the school. Paradiso refused to produce admissions information requested by Schainker and, according to Alioto, defended the admissions process as being primarily responsible for the increasingly favorable reputation of the school. Alioto Dep. 36; Schainker Dep. 32-33. No changes were made in the admissions procedures, and Paradiso ultimately resigned in 1973 in part because of this dispute with Superintendent Alioto. Reginald Marra, Saunders' principal from 1974 to 1983, adhered to the admission standards used in prior years. Tr. 12,784-85, 12,821-22 (Marra).

The controversy surrounding the disproportionately low minority enrollment at Saunders reached a head in the mid-1970's. In 1976, Bertram Wallace, Director of Occupational Education, sought detailed information on the admissions process at Saunders in an effort to determine whether vocational program opportunities could be expanded. In particular, Wallace was concerned with the expansion of such opportunities so as to include more minority students. Tr. 12,825-26 (Marra). Wallace's efforts coincided with the increasing concern of minority community members regarding the low number of minority students at the school. P-I 75-25, 75-27. Wallace was successful in obtaining substantially greater federal funding for vocational education programs than had been received previously by the school district. Alioto Dep. 146. According to Reginald Marra, however, no action was

requested of or taken by him in response to Wallace's inquiries regarding minority student enrollment at Saunders. Tr. 12,825-26.

In 1977, the Advisory Council for Occupational Education appointed a committee to review admissions procedures at Saunders. The committee, comprised of Nicholas D'Angelo, a Saunders graduate and Chairman of the Advisory Council, Hector Ghimenti, executive director of the Yonkers Human Rights Commission, and Herman Keith, was given the task of reviewing Saunders' admissions procedures in part to insure that "selection be made in a fair, unbiased" manner. GX 665. The committee's report, *id.*, after noting the increasingly competitive nature of the Saunders admissions process and describing the procedures used for selection, concluded that students were selected on the basis of "merit only" with particular emphasis on reading and math scores. The report stated that applicants for the ninth grade exploratory program were rejected largely because of space limitations but that most of the rejected applicants were accepted upon reapplying the following year. No findings were made regarding the disproportionately low number of minorities at Saunders; the only recommendation which specifically referred to minority students was that greater effort be made to increase reading and math scores, particularly at Fermi and Hawthorne, two middle schools with predominantly minority student populations (56% and 53%, respectively, in 1976-77).

The Board's efforts to improve the district's vocational education program culminated in the long-recommended closing of the old Saunders facility in 1979 and the relocation of Saunders' vocational programs to the newer and larger Burroughs facility, located in Central Yonkers, in 1980. This decision resulted in increased capacity for vocational and occupational education programs and a concomitant increase in minority enrollment in these programs. In 1976, Saunders enrolled 777 students, thirty-eight (4.9%) of whom were black; in 1980, ninety-nine (10.8%) of Saunders' 917 students were black. This increase in minority

enrollment also coincided with increased recruitment efforts by school officials, beginning in 1979, designed to encourage minority students to apply to the school. Tr. 12,749-50 (Marra).

As a result of the disproportionately low percentage of minority students at Saunders during the 1960's and 1970's, such students were enrolled in greater numbers in the district's remaining high schools. These high schools, however, were generally reluctant to assume the task of providing vocational program opportunities because of the availability of such programs at the district's vocational schools. While some expansion of vocational programs in the regular high schools did occur during the 1970's, the extent of this expansion was limited and far below that which had been previously recommended, most notably in a 1968 NYU study on Occupational Education For Youth in the City of Yonkers, GX 645, and in the 1972 NYU Report. GX 115. As a result, many students were enrolled in the so-called general program, which was neither academic nor occupational in nature. GX 645, at 17-18 (referring to general program as a "grey area" of education).

The inadequacies of the general program at Yonkers high schools have been discussed elsewhere in these findings. *See* SCHOOLS IV.B.4 *supra*. Of particular relevance here is the fact that these inadequacies have often been recognized in conjunction with recommendations to expand opportunities for students enrolled in high school general programs to receive instruction in vocational and occupational education. A 1968 study by the New York University School of Education and a 1969 Chicago-based educational consultant's Master Plan for Occupational Education both noted the failure of the general program to meet the educational needs of the non-academic pupil and the lack of adequate occupational or vocational instruction at the district's non-specialized high schools. GX 645, at 42-44; GX 646, at 30-31, 46-48. This problem was particularly evident at Gorton and Yonkers High Schools, which by 1971-72 enrolled 84% of the

district's non-vocational high school minority students. Although large numbers of white students were affected by the deficiencies of the general program, the widespread nature of the program at the district's two disproportionately minority schools (Gorton, for example, was described as having 70% of its students in the general program; *see* GX 115, at 36), along with the apparent disproportion of minorities in the general program itself, Tr. 2445 (Guzzo), resulted in many of the district's high school minority students being deprived of academic and vocational education opportunities comparable to those provided elsewhere in the district. The inadequacies of the general program, and the disproportionate number of minority students in the two high schools most affected by these inadequacies, continued through the 1970's. Tr. 2447-54 (Guzzo); *see* SCHOOLS IV.B.4 *supra*.

The question of whether there has been unlawful discrimination in the operation of vocational programs in Yonkers public schools is a difficult one. Direct evidence of discriminatory intent is absent from the record: no evidence was presented which demonstrates that school officials established entrance requirements at Saunders in order to exclude minorities from the school; no evidence exists of any minority student being denied admission at Saunders in part because of their race. The disproportionate impact of the selection process was not as extreme as in other instances of Board conduct and was primarily felt by black students only. The use of somewhat similar admissions criteria at the former High School of Commerce was accompanied by disproportionately *high* numbers of minority students at the school. In addition, while the Saunders admissions criteria contained an element of subjectivity, the admissions process lacked more obvious prerequisites, such as regularly conducted interviews or special entrance examinations, which may have served either to discourage or to exclude minority students from applying or enrolling at the school. *Cf. Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 942-43.

Several factors, however, persuade us that a finding of unlawful segregation is warranted. The increase in the disproportionately low representation of blacks at Saunders mirrored the increasingly competitive admissions process (and thus the heightened use of educationally less than precise criteria for admission) and the steadily increasing enrollment at the school. The increasingly competitive nature of the Saunders admissions process during the early 1970's was itself caused in part by the acknowledged inferiority of educational programs at West Yonkers high schools. This condition, which had a disproportionate impact on minorities, makes the Board's failure to address the exclusion of minorities from Saunders even more troublesome: the recognized inadequacies of the general program at Yonkers and Gorton should presumably have led to at least some efforts to provide equal educational opportunities for minority students by including them in the district's vocational education program at Saunders. The school district, though aware of the systematic exclusion of minorities which resulted from the Saunders admissions process, did relatively little until the late 1970's to eliminate the discriminatory impact of the methods by which students were chosen. *Cf. Morgan* v. *Kerrigan*, *supra*, 509 F.2d at 594; *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 942-43. While some attempts were made in 1973 to address the issue of the disproportionately low number of minorities at Saunders, these efforts were ultimately unsuccessful and abandoned and resulted in no significant change in the admissions process. The school's limited capacity also does not adequately account for the district's ability to enroll steadily increasing numbers of students, few of whom were black, at the school. Finally, the direct evidence concerning the steering of minorities into inferior educational programs prior to Saunders' transformation into a reputable vocational school supports the inference that the disproportionately low number of blacks at Saunders was in part the result of the effects of this discriminatory treatment on the desire of black students to enroll at the school.

The disproportionate impact of the Saunders selection process has recently shown a significant decline. From 1977-78 to 1980-81, the minority enrollment has increased from approximately 10% to 15.7%; during this period, the districtwide high school minority enrollment remained relatively constant — 30.1% in 1977-78, and 30.5% in 1980-81. Yet while the recent efforts to recruit minority students, as well as the expanded opportunities now available to all students by virtue of the relocation of the Saunders program to newer and larger facilities in 1980, have rendered the exclusion of minorities from vocational programs less likely or foreseeable, the recent nature of these developments does not preclude our finding of discriminatory intent. *Cf. Arthur* v. *Nyquist, supra*, 415 F.Supp. at 941, 943. On the contrary, in 1972, Saunders' black student enrollment was 3.8%, less than one-third of the district's 11% high school average black student enrollment; as recently as 1979, the black student enrollment at Saunders was 9.8%, substantially less than the 17.7% districtwide high school average and less than one-third of the 32% average at West Yonkers high schools. While the 1977 Advisory Council report found neither discrimination nor subjectivity in the Saunders screening process as it then existed, this finding does not outweigh the significance of school administrators' earlier recognition of the systematic exclusion of minorities from Saunders and the subsequent failure, until recently, to meaningfully address this condition in a way which would result in increased enrollment of minorities at Saunders. In sum, we conclude that the racially disproportionate consequences of the Saunders admissions process, the Board's failure to address this condition, and the other circumstances surrounding this disproportionality are sufficient to support a finding of intentionally created segregation of and discrimination against minorities as of the institution of this action.

D. Special Education

The history of the Yonkers school district's Special Education program is perhaps the most striking illustration of the fine line, running throughout the school desegregation portion of this case, between benign intentions and actions with unfortunate consequences, and similar actions which are also prompted by race-related factors or concerns.

Several types of Special Education classes have existed over the years for various classifications of mentally and physically handicapped children. These classes have included classes for the trainable mentally retarded (TMR); emotionally handicapped (EH); physically handicapped (PH); neurologically impaired (NI); and hearing, visual and language impaired. Tr. 4244 (Malanga); P-I 78-12. In addition, and of primary concern here, the district's Special Education program has included classes for the Educable Mentally Retarded (EMR), Emotionally Disturbed (ED), and Learning Disabled (LD).

Prior to the mid-1970's, the procedures for assigning students to Special Education classes were fairly ill-defined. *See* Schainker Dep. 10-11 (describing process as "fuzzy"). During this time period, the referral of a student for Special Education instruction originated from individual teachers operating without the aid of written guidelines. A student was referred initially to a school psychologist, who would perform an evaluation of the student. The results were then forwarded to the school principal, who would decide whether to refer the student to the district's Special Education screening committee, the Committee on the Handicapped ("COH"). After evaluating the recommended reference, the COH would decide whether the student should be enrolled in a Special Education class. If the student was assigned for Special Education instruction, the COH would designate a specific program classification for the student.

Special Education classes were assigned to schools in the district on a space-available basis, with such determinations being made in June of the preceding school year. The criterion of space availability resulted in the frequent movement of Special Education classes between schools from year to year and also led to the placement of such classes in non-standard classroom facilities (*e.g.*, a sub-basement) within the schools themselves. Tr. 4243, 4246, 4252 (Malanga). As a result, Special Education students experienced frequent disruptions in school assignments unlike those experienced by other students in the district.

Space availability was and has been determined largely by school principals, who have frequently resisted the placement of Special Education classes in their buildings. Over the years, the stated reasons for this resistance have varied. Oftentimes, principals would indicate that they lacked the building capacity for Special Education classes, thus requiring school officials to find available space elsewhere. Tr. 4253 (Malanga). In other situations, the resistance has been more ill-defined and unrelated to any tangible impediments to the inclusion of Special Education programs: an unexplained but firm resistance to the incorporation of such programs, GX 693; an unwillingness to assume the burdens of another school's Special Education programs, GX 695, Tr. 4256-58 (Malanga); or the "inhospitable climate" in a school, emanating from the resistance of teachers and parents to Special Education programs, GX 696. Robert Dodson, the school official responsible for directing the Special Education program in the mid to late 1970's, testified that, in his opinon, resistance to the placement of Special Education programs in particular schools was often pretextual and in fact represented race-related opposition to the incorporation of such programs. Tr. 13,028-29.

The 1960's were marked by an increasingly disproportionate number of minorities in Special Education programs.[115] In 1961, elementary school Special Education classes were 22% minority, while the remaining elementary school enrollment was 10% minority. GX 56. By 1967-68, Special Education classes were 43% minority, as compared with a 14% districtwide minority student enrollment. As of 1971-72, the Special Education program was 40% minority, or double the 20% minority student enrollment districtwide.

The disproportionate number of minorities in Special Education programs was considered by school officials to be the result of discriminatory assumptions made and processes used by school district staff regarding the behavior of minority students. *See* Schainker Dep. 18-19; *see also* Alioto Dep. 117-18. School officials recalled that minority students exhibiting aggressive or "acting out" behavior often simply would be referred to the school's principal for placement in a Special Education class, a referral that would be recommended for disciplinary purposes. Tr. 5081 (Jacobson); Schainker Dep. 18. The Special Education program was perceived by school officials and community mem-

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[115]While the United States indicated in interrogatory responses that it did not allege or seek to introduce evidence to demonstrate that any individual classification decision was the result of any individual employee's intentionally discriminatory conduct, *see* United States' Response to Yonkers Board of Education's Third Set of Interrogatories, at 61-62 (#33,35), this does not preclude an examination of the placement and referral process to determine whether the pattern of disproportionality adverted in text, together with testimony and other evidence regarding the conclusions reached by school officials as to the reasons for such disproportion, demonstrates that the operation of the Special Education program was affected by an intentionally discriminatory referral process. The interrogatory response reflects a limitation on the method by which such discrimination was to be proved, not a preclusion of the government's claim or the evidence actually submitted in support. Of course, any limitation which does exist does not apply either to the NAACP or to plaintiffs' claims of discrimination in the non-referral aspects of the Special Education program, such as the transportation of disproportionately minority Special Education classes to virtually all-white schools.

bers as a "dumping ground" for blacks. Tr. 11,052, 11,081 (Jacobson); GX 690.

As a result of the district's referral process, two fairly distinct categories of Special Education students evolved, each being identifiable primarily by the enrolled students' race. Minorities were typically assigned to ED classes, while white students were assigned to EH, and later LD, classes. *See* Alioto Dep. 40; Tr. 4144, 4164 (Carman); Tr. 13,024, 13,161 (Dodson). By 1972, white students represented approximately 75% of all students in the LD program; the ED program, on the other hand, was virtually the precise opposite, with over 70% minorities. GX 689.

Another feature of the Special Education program was the frequent placement of disproportionately minority classes in out-of-district, predominantly white schools. GX 703, at 4. As far back as the 1950's, predominantly minority Special Education classes were placed in virtually all-white schools. Tr. 2408-10 (Guzzo) (Twain Junior High School). During the 1960's, the district's first ED classes were placed in School 15, a virtually all-white elementary school in Northeast Yonkers. Tr. 4243-45 (Malanga). In 1967-68, School 15 had six minorities (2%) in its regular program and four minorities (100%) in its ED class. By 1971-72, the school enrolled three minorities (1%) in the regular program and eleven minorities (69%) in its two Special Education classes (one ED (seven students) and one LD (nine students)). GX 64, 686. A similar situation existed at Schools 16 and 4 as well. In 1967-68, School 16 enrolled no blacks and two hispanics (0.4% minority), whereas its Special Education class had nine blacks (64%). By 1971-72, the disproportion, while considerably smaller, was still quite noticeable: eight regular program minorities (2%), as compared to ten Special Education minorities (39%) (at least thirteen of the school's twenty-six Special Education students were in ED classes). GX 64, 686. In School 4's TMR classes, there were four hispanics (1%) in the regular program in 1967-68, as compared to nineteen blacks and

three hispanics (20%) in Special Education classes; by 1971-72, the school had five regular program hispanics (1% minority), as compared to twenty blacks and three hispanics (24%) in Special Education classes. Although the absolute number of students placed in ED classes was relatively small, the combined effect of the disproportionate number of minorities in such classes and the frequent placement of such classes in virtually all-white schools was striking: by 1972, forty-nine of the districts sixty-three elementary school ED students, approximately 75% of whom were minorities, attended six elementary schools (15, 16, 22, 28, 31, 32), four of which were located in East Yonkers and all of which had at least a 97% white student enrollment in regular programs. GX 64, 686, 689.

Other practices affecting Special Education students further earmarked them in a distinctly negative manner. Because school assignments were generally made without regard to a student's residence, Special Education students were often transported lengthy distances directly and even diagonally across the city. Such trips were often well over one hour in length and sometimes up to two hours long each way. GX 694, at 53,543; Tr. 4172 (Carman). These students, a disproportionate number of whom were minorities, arrived at their school earlier or later than other students and left school earlier than other students. In some instances, Special Education students entered their school through separate entrances to the building. Tr. 4245-46 (Malanga); Tr. 4292-93 (Hammer). Such students were kept in separate classrooms during the course of the school day; these classrooms were often located in secluded areas of the school such as subbasements or otherwise empty floors. Tr. 4243-52 (Malanga). Special Education students generally ate lunch and took gym classes and recesses separately from other students and often did not participate in other school activities with other

students.[116] To the limited extent that Special Education students did come into contact with other students in the school, this interaction was often negative in origin. For example, at 98% white School 15, a former student recalled that the predominantly minority Special Education students were used as examples of "poor, bad behavior." Tr. 4289 (Hammer).

All of the aforementioned practices had what can fairly be described as a severely stigmatizing impact which was recognized by other students in the school, by school officials, and by community members. Special Education students were perceived by other students to be "different ... and bad," Tr. 4294, 4296 (Hammer), students whom white children "were not supposed to have anything to do with in school" and who "had something wrong with them," Tr. 5196 (Morris), and who were called "retards," *id.* One principal testified that students were afraid to go to the bathroom or play in the playground because they feared the presence of ED students. Gold-Marks Dep. 40-41. Joan Malanga, a former Special Education Coordinator (1972-79) and teacher, testified that School 15 parents and community members protested the presence of her "niggers" in their school and sought to have them removed. Tr. 4248.

Even more disturbing is the degree to which the policy of assigning minority Special Education students to virtually all-white schools has contributed to stereotypical generalizations about *all* minorities, not just Special Education students themselves. Because disproportionately minority Special Education classes were often assigned to overwhelmingly white schools in which few other minority students were enrolled, the interaction of white students with minorities often consisted primarily of interaction with Special Education students. The often vivid testimony of parents, PTA members, and school officials clearly

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[116]This practice was not universally followed. At School 4, for example, Special Education students participated in art classes and assemblies. P-I 4-6.

demonstrates the discriminatory generalizations which this practice engendered. PTA Council President and parent Susan Morris recalled her childrens' perception that "the terms 'nigger' and 'retards' were interchangeable," an impression which stemmed from the fact that their contact with blacks consisted basically of minority Special Education students in their school. Tr. 5196. Robert Dodson expressed his concern to other school officials that the placement of minority Special Education students in virtually all-white schools would have a negative impact on parents, teachers and students' perceptions of Southwest Yonkers students in general. Tr. 13,027. Dr. Gary Carman, the district's Special Education Director from 1972 to 1975, similarly concluded that where "the total experience of those youngsters in that east side school as related to black children were [Special Education] kids" —children who Dr. Carman believed "had to be viewed by other children as less worthy" — then it would be "easy for me to believe that they would generalize that to all blacks." Tr. 4157. Several other witnesses testified to similar effect. *See* Tr. 5309-10 (Frauenfelder) (Council of PTA's President); Tr. 4427 (Butler) (School 22 PTA President); Tr. 5417 (Siragusa) (Council of PTA's President and Board member). The district's Special Education practices have thus had an impact beyond the particular minority students in the classes themselves. Indeed, an additional, likely consequence of the district's Special Education program practice — resistance to the desegregation of public schools — has been recognized by school officials as well. For instance, at School 32, a 7% minority school in 1980 which had disproportionate numbers of minorities in its ED classes,[117] blacks enrolled in the school's regular program have had difficulty gaining accceptance in the school as a result of the district's

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[117]In 1979-80, School 32's Special Education ED classes were 42% minority; the minority students in such classes constituted 42% of the school's total minority student enrollment. GX 64; SB 812.

placement of disproportionately minority Special Education classes at the school. Tr. 4840-41 (Jamieson).

By the early 1970's, the district's discriminatory treatment of minority Special Education students was recognized with increasing frequency and concern by school officials. At a 1971 meeting of the Yonkers Commission on Human Rights, Dr. Dorothy Morrison, until 1972 the Director of Special Education, acknowledged that students, a large number of whom were minorities, were frequently assigned to Special Education classes as a result of pressure from principals and teachers to remove these students from regular classes. GX 688. Superintendent Alioto and his staff also recognized the need to address the problem of discriminatory placement of minorities in Special Education programs, one characteristic of what he concluded was the worst Special Education program in the state. Alioto Dep. 38; *see also* Schainker Dep. 9-13.

In August 1972, the district hired Dr. Gary Carman, an individual with extensive training and background in special education, to direct the district's Special Education program. Dr. Carman observed that the Yonkers school district, like many other school districts around the country, was placing Special Education students in self-contained classrooms and that Special Education classes contained disproportionate numbers of minorities. He noted in particular the high representation of minorities in particular programs, such as ED classes, a phenomenon which he had observed in rural communities elsewhere. Nevertheless, Dr. Carman also testified that the Yonkers school district's Special Education program was the most inhumane he had ever seen. Tr. 4156. His conclusion, like Superintendent Alioto's, was based in part on the district's practice of assigning students to schools all over the district on a space-available basis, a practice which Dr. Carman recognized not only as lacking any particular educational justification but also as burdensome and stigmatizing to Special Education students. He also based his conclusion on

the physical segregation, or failure to "mainstream," students in the schools to which they were assigned as well as the manner in which these students entered and departed from school. Tr. 4156. Dr. Carman testified that based on his experience both in New York and elsewhere, he "knew of no causes, medical causes, social causes, biological causes that could possibly account" for the disproportionate number of minorities in Yonkers' ED classes. Tr. 4144.

Although Dr. Carman indicated at trial that he found no evidence that school officials or teachers acted "with the intention of discriminating against" minorities in their operation of the Special Education program, Tr. 4224, he nevertheless recognized that racial factors played a significant role in Special Education program decisions. In a series of letters to various school officials in 1973 and 1974, Dr. Carman attributed the disproportionate minority enrollment in the district's Special Education ED classes to the "inherent racism" of white persons and "cultural differences" between minority children and the district's professional staff. He noted that prior to 1972, children were placed in ED classes in particular "because they were disrupting classroom environments, or experiencing school failure and were members of racial minorities," and that once they were so assigned, these students rarely were able either to return to regular classes or to graduate. GX 690, 691. Dr. Carman reaffirmed these findings when he recognized at trial that

> I believe that white people, and I include myself, view blacks and other minorities stereotypically and the amount of racism, I personally believe it exists in most of us. I also believe it exists in most blacks. I think that is what was operating when I looked at the overrepresentation of minority children in special education.
>
> I don't believe that the staff in the City of Yonkers said let's put this black kid in special education because he is black. I think they said let's put this kid in special education

> because he is disturbed, and they thought that in large part because of his black behavior.

Tr. 4,236-37.

We recognize the difficulty of the decisions which were required of school officials in their operation of the Special Education program. Placement decisions involved evaluations based primarily on a student's exhibited behaviorial tendencies and thus almost inevitably called for partly subjective determinations. Nevertheless, the evidence does not suggest that the Yonkers school district's Special Education program was simply another in a series of flawed Special Education programs then in existence. As noted previously, both Dr. Carman and other school officials acknowledged that the program was unusually discriminatory in its impact and that the evaluative process, even though a difficult one, was particularly prone to unwarranted racial assumptions. Asked whether black children were difficult to control in a regular classroom environment, Carman replied that this was the case "in Yonkers. I wouldn't say difficult by nature." Tr. 4225. In addition, some of these practices, such as the transportation of minority Special Education students to largely white schools on what essentially amounted to an intact basis, are not similarly explainable on such grounds. We recognize that discriminatory practices in this area, as elsewhere in the operation of the school system, were not simply the result of racial hatred or any ill-conceived desire to subject minority children to highly stigmatizing and inferior treatment. However, the practices and decisions governing the Special Education program, however innocently arrived at, were in part the product of racially-related criteria and judgments which cannot be dismissed as educationally or legally justifiable. In short, the record demonstrates that prior to the mid-1970's, the discriminatory consequences of the school district's Special Education program were the result of decisions and actions in which impermissible racial factors played a significant part.

The district's response to Dr. Carman's initial findings consisted of basic agreement with his evaluation of the Special Education program and a concerted effort toward improvement. In November 1972, school officials conducted a three-day workshop sponsored by the state's education department at which many of the aforementioned problems were discussed. GX 692. Soon thereafter, under Dr. Carman's leadership, the district began to implement a number of recommended changes in the operation of its Special Education program. Among the most significant changes which occurred was an alteration in the location of Special Education classes. As a result of the Board's adoption of Superintendent Alioto's 1973 school reorganization proposals, the school district was divided geographically into quadrants and Special Education students were assigned whenever possible to schools within their quadrant. GX 114, at 3; Tr. 4169-70 (Carman). Consequently, Special Education students began to experience a reduction in the distance and duration of their trip to school, and the stigmatizing effect of placing minority Special Education students in virtually all-white schools was substantially reduced.

Other changes in the operation of the Special Education program were made as well. Dr. Carman became chairman of the COH in order to give himself an opportunity to personally ensure that the decision to place minority children in Special Education classes was properly made. In addition, parental participation in the screening process was increased by making them voting members of the COH. Finally, in the fall of 1973, the district began to return Special Education students to regular classes. These students continued to receive Special Education assistance from a resource teacher, who typically would provide special instruction outside the regular classroom setting.

These changes produced fairly quick results. Although Dr. Carman was not asked to and had not conducted individual, case-by-case evaluations prior to making his recommendations for

reform in order to determine the reasons for the disproportionate number of minorities in particular Special Education programs, in 1973 some ED students were returned to regular classes at his suggestion and the overwhelming majority of them remained in these classes. Tr. 4167. The number of students referred to ED classes declined from forty-two in 1972-73 to six in 1973-74. GX 691. In addition, available statistics suggest that the disproportionate number of minorities assigned to ED classes in predominantly white elementary schools also declined. For example, while the number of Special Education students in School 16 (2% minority) in 1971-72 was twenty-six,[118] ten of whom were minorities, in 1975-76 these numbers were twenty-eight and five, respectively. At School 32 (4% minority), the number of minorities in Special Education programs, including ED classes, decreased from fourteen out of thirty-five in 1971-72, to zero out of fourteen in 1975-76. By 1975-76, approximately 11% of the ED students in predominantly white elementary schools were minorities.[119]

After Dr. Carman left the Yonkers School District in 1975, responsibility for the Special Education program was assumed by Director of Special Services Robert Dodson, a minority school

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[118]GX 64 indicates that School 16 had 26 Special Education students in 1971-72. GX 686 indicates that School 16 had 13 Special Education students, all of whom were in ED classes. While this discrepancy may be due to enrollment fluctuations during the course of the school year, GX 686 is nevertheless helpful insofar as it indicates the particular type of at least some of the Special Education classes at the school.

[119]This number was computed by dividing the number of minority Special Education students in predominantly white schools containing ED classes (five) by the total number of Special Education students in these schools (46). SB 812. This figure may well overstate the number of students in ED classes since some Schools had both ED and other types of Special Education classes, and student enrollment data for each particular class was not introduced. Nevertheless, this evidentiary gap does not significantly affect the usefulness of examining minority student enrollment in ED classes on a comparative, year-to-year basis, in order to detect particular trends over time.

administrator who had participated in the district's 1972 workshop but was not trained in special education, and Assistant Director for Special Education Joan Malanga. The next several years were marked by additional efforts in certain areas of the Special Education program and the perpetuation or reappearance of previously recognized problems with the program. Under Dodson, the district established within each school a School Pupil Review Team, or SPURT. These committees, consisting of professionals similar to those that comprised the COH, were designed to increase the referring school's role in determining whether to refer a student to a Special Education program, with the goal of reducing the number of referral determinations to be made by the COH. In addition, efforts were made to include Special Education students in extracurricular activities at their assigned schools, in keeping with Dr. Carman's efforts to mainstream such students into the schools' regular programs.

On the other hand, a number of other problems were left unaddressed, and previous patterns of disproportionality in the placement of minorities in ED classes and in virtually all-white schools reappeared. In 1976, the space availability criterion continued to be used for elementary and middle school referrals, a circumstance which Malanga noted was disruptive, burdensome and would not have been a problem had the affected students been assigned to regular, rather than Special Education, programs. GX 697. This policy also resulted in the increased incidence of assigning minority Special Education students to oftendistant, predominantly white schools in which they represented a significant portion of the school's total minority student enrollment, a trend which was discernable both for Special Education students generally and ED students in particular. In 1975-76, only four elementary schools with less than 15% minority student enrollments had minority Special Education student enrollments comprising over 20% of the school's total minority student population; by 1980-81, there were nine such schools, seven of which had minority Special Education student enrollments comprising

over 30% of the school's total minority student population. As for ED students, in 1975-76 approximately zero to five ED students at heavily white (less than 5% minority) elementary schools were minorities.[120] By 1979-80, approximately twenty-seven to thirty-seven ED students at heavily white (less than 11% minority) schools were minorities. SB 812. Malanga recognized this phenomenon and its stigmatizing consequences at the time but testified that the school administration reacted with "indifference" and, in one instance, assigned an ED class to heavily white School 22 despite the school's previous inhospitable reception to, and inadequate facilities for, Special Education programs. Tr. 4262-63, 4279. In 1979-80, School 22 was 9% minority (twenty-two minorities), with seven minorities in its eleven-student ED program. SB 812.

The disproportionate referral of minority students to Special Education programs, particularly ED classes, eventually became the subject of investigations by state education officials and the United States Department of Education's Office of Civil Rights. Those investigations culminated in findings reaffirming that such disproportion did in fact exist and, according to the federal investigative findings, was "the result of methods of administration which subject[ed minority ED students] to discrimination." GX 699. Donald Batista subsequently assumed responsibility for directing the Special Education program and, under his direction, the district reevaluated many of the students then assigned to ED classes. Under Batista's direction and in response to the aforementioned governmental investigations, the district compiled in September 1980 a revised procedural manual for the COH to use in operating the district's Special Education program. SB 466.

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[120]The zero figure takes into account the possibility that minority Special Education students in schools with both an ED and an LD class were all in the LD class. Looking only at those predominantly white elementary schools with ED classes *only*, the number of minority students in these schools increased from zero (out of four ED students) in 1975-76 to 27 (out of 52 ED students) in 1979-80. SB 812.

One month after the filing of this action, the United States Department of Education and the Board reached an agreement whereby the Board undertook to implement certain remedial measures relating to the operation of its Special Education program. According to the Department of Education, these procedures, if fully implemented, would ensure compliance with Title VI and the regulations thereunder. SB 479, 480.[121]

The Board, in its trial brief, contends that its decision to place black Special Education students in predominantly white schools was preferable to the more segregative alternative of placing these students in predominantly minority schools in Southwest Yonkers. In its post-trial submissions, the Board argues further that its placement of disproportionately minority Special Education classes in East Yonkers schools was justified by greater space availability at these facilities and, in any event, cannot be considered racially segregative. In our view, the Board's contention unduly minimizes the severely stigmatizing consequences of its "integrative" approach; in similar circumstances,

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[121]The Board argues that the consensual resolution of the United States Department of Education's charges regarding the district's Special Education program should preclude inquiry into the program as it existed prior to this resolution. We agree that, with respect to the United States, the fact that the aforementioned allegations were consensually resolved cannot be relied upon by this Court as independent evidence of wrongdoing and that such resolution may eventually preclude the United States from challenging the sufficiency of the previously agreed-upon remedial measures during the remedial phase of this case. However, we adhere to our prior ruling that evidence of the Board's conduct in this area is admissible for the purposes of demonstrating segregative or discriminatory intent consistent with other evidence of discrimination or segregation in the operation of Yonkers public schools, and for the purpose of demonstrating the segregative consequences of the Board's conduct in this area. Tr. 4132-40. *See Dayton Board of Education* v. *Brinkman*, 443 U.S. 526, 539 n.11 (1979); *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 941. This conclusion is also supported by the fact that the Department of Education's findings do not address the propriety of other aspects of the district's treatment of minority Special Education students or the stigmatizing effects of such practices. We also note that the aforementioned evidentiary limitations urged by the Board are inapplicable insofar as the NAACP is concerned. Tr. 4140.

such actions have consistently been found to be discriminatory despite their facially "integrative" consequences. *See Reed* v. *Rhodes*, 607 F.2d 714, 730 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980); *Armstrong* v. *O'Connell*, *supra*, 451 F.Supp. at 852; *Berry* v. *Benton Harbor*, *supra*, 442 F.Supp. at 1306. The continuation of this practice in the mid to late 1970's despite an awareness of this stigmatization and its effect on the community's perception of minority students substantially undermines any argument that the Board's integrative approach was designed for any benevolent or racially desegregative purpose, or was preferable to placing such students in predominantly minority, geographically more proximate schools. Moreover, the Board ignores the fact that desegregation of the schools to which Special Education students were assigned would have substantially avoided the stigmatizing effects of its Special Education school assignment policy. Even the retention of Special Education students at their predominantly minority neighborhood schools would have at least been consistent with the Board's regular assignment practices and would have also avoided the stigmatizing and burdensome effects of its conduct. Indeed, to the extent the district's Special Education program assignment policy contributed to racial stereotyping and resistance to desegregation and thus made community acceptance of desegregative reorganization plans more unlikely, the policy did have indirect segregative consequences on the racial composition of Yonkers public schools. Given the inconsistent and otherwise suspect application of the space availability criterion and the Board's awareness of its discriminatory consequences, we cannot accept either space availability or the absence of any racial "segregation" of minority Special Education students as sound, consistent or neutral justifications for the discriminatory manner in which the Special Education program was conducted.

The evidence as a whole supports the conclusion that the Special Education program has at various periods of time and in various ways been operated in an unlawfully discriminatory man-

ner. The striking disproportion in minority student enrollment in Special Education classes prior to 1972, the evidence of the assumptions and attitudes which influenced the referral process, and the various ways in which Special Education students were treated once referred, are persuasive evidence that the Special Education program was operated in an impermissibly discriminatory manner. While the substantive judgments of school officials in this particular area are not easy ones either to make or to review, the unique disparities in the treatment of minority Special Education students in Yonkers' public schools — as evidenced by their disproportionate presence in such programs, as well as the other practices affecting such students and their known, avoidable and highly stigmatizing effects — make deference to educational decisionmaking judgments unwarranted in this situation. *Cf. Berry* v. *Benton Harbor, supra,* 442 F.Supp. at 1307-08 (intact busing and assignment of minority students from demolished minority school to predominantly white school not justified by fact that classes were part of state program for deprived areas, even if school district obtained additional funds as a result). *Compare Alvarado* v. *El Paso Independent School District,* 426 F.Supp. 575, 609, 615 (W.D.Tex. 1976) (finding no liability where implementation of special education diagnostic program was not accompanied by disproportion in number of minority students in classes for mentally retarded), *aff'd,* 593 F.2d 577 (5th Cir. 1979). The placement of disproportionate numbers of minority Special Education students in predominantly white schools lacked any plausible justification rooted in current educational practice and resulted in a compounding of the discriminatory manner in which Special Education students were treated. Such assignments, like the assignment of faculty and staff, were not constrained or compelled by "neighborhood school" considerations or any other topographic or demographic factor. Rather, the Board's assignment practices for Special Education students were clearly inconsistent with its general neighborhood school policy and were allowed to continue to a significant extent despite

the district's awareness of the stigmatizing consequences of these practices. Although significant and partly successful efforts were made during the mid-1970's to improve several aspects of the district's Special Education program, other stigmatizing practices either resurfaced or were permitted to continue. This factor, together with the spillover effects of the district's previous discriminatory practices and their impact on school desegregation generally, demonstrates that the historically discriminatory operation of the Special Education program continued to have discriminatory effects as of the filing of this action.

E. Teacher and Administrative Staff Assignments

The racial identifiability of Southwest Yonkers public schools has developed not only with respect to students but also with respect to teachers and administrative staff. While the absolute number of minority staff members[122] and the methods by which they have been assigned have varied over time, the disproportionate representation of minority staff in schools with a disproportionate or predominant number of minority students has been a constant feature of Southwest Yonkers schools.

Prior to the late 1960's, the Yonkers school district employed few minority teachers or administrators. At least two of the first three black teachers hired by the district from 1946 to 1950 were assigned either to School 1 or School 6, the two most heavily minority schools in Yonkers at the time. Hamilton Dep. 4,29-30; GX 985. The number of minority staff increased over the next several years; for example, by 1958, Longfellow Junior High School, which had a relatively small but disproportionately minority student enrollment, had three black teachers on its staff. Tr. 13,004 (Dodson). By the mid-1960's, Yonkers High School,

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[122]The term "staff" is used to refer to teachers, principals, and assistant principals. GX 64; Tr. 3184-85 (Sweezy).

which in 1967 enrolled 36% of the district's high school minority students, had three black teachers as well. Tr. 2420 (Guzzo).

By 1967-68, the Yonkers school district employed ninety-seven minority staff members, comprising 7% of its total staff. By this time, the disproprortionate representation of minority staff in disproportionately minority schools was beginning to emerge. Of the eight elementary schools with greater than 10% minority staff, four of them, including the two schools with the highest percentage of minority staff, were less than 20% non-minority schools (4,9,22,32). The four elementary schools with no minority staff members, however,[123] were all schools with at most 13% minority student enrollments (11,13,16,23). The seven[124] elementary schools with over 25% minority enrollments, all but one of which (School 24) was located in Southwest Yonkers, employed 40% of the district's minority elementary school staff. As for the district's junior high schools, 75% of the minority staff was assigned to the three schools, all in Southwest Yonkers, with the highest minority student enrollments in the district. The four secondary (junior and senior high) schools with minority student enrollments greater than the districtwide average employed 31% of the district's total secondary school staff, but employed 52% of the minority secondary school staff.

In the late 1960's and early 1970's, the Board, primarily under the leadership of Superintendents Mitchell and Alioto, made increased efforts to recruit minority teachers and administrators to the school district. This period was also occasioned by

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[123]While GX 64 indicates that School 19 (68% minority) had zero minority faculty, this information is not relied upon since this exhibit also indicates that the total number of faculty at that school was five. GX 89 provides a more realistic and accurate indication of the size of the school's total faculty — 22 members. Given that six of the seven most disproportionately minority schools in Yonkers had at least two minority staff members in 1967-68, it is unreasonable to assume that none of the School 19 staff members were minorities.

[124]This does not include School 19. *See* fn. 123 *supra*.

an alteration in the district's hiring procedures; as of 1972, hiring decisions previously made by the Personnel Department were now to be made by school principals themselves by selecting applicants from central personnel files and interviewing them for positions in their schools. GX 798. The district's increased recruitment efforts resulted in an accompanying rise in minority staff from ninety-five (1967) to 133 (1970) to 174 (1975).

At the same time, the district's procedures for assigning or transferring teachers to particular schools became more formally structured. In 1969, the Board and the Yonkers Federation of Teachers entered into their first collective bargaining agreement. This agreement, which has remained substantially the same since 1969 insofar as teacher assignment practices are concerned, affords teachers the right to transfer voluntarily to available positions in the district's other schools, with priority based on order of seniority. Thus, the hiring and assignment of new faculty has been effectively limited to filling vacancies not otherwise filled by already-employed teachers exercising their seniority rights.

The collective bargaining agreement also limits the district's ability to require teachers to transfer involuntarily. Nevertheless, the agreement reserves to the Board the power to implement such transfers "when judged to be in the best interest of the school system." GX 794, at 30; GX 795, at 32; GX 110, at 33; GX 108, at 33. Despite this residual flexibility in staff assignments and the Board's awareness of the increasing disproportion of minority teachers in minority schools during the early 1970's, this provision was rarely exercised.

At the time of the Board's initial contractual agreement with the Yonkers Federation of Teachers, the disproportion in minority staff at predominantly minority schools was becoming increasingly clear. In five elementary schools with over 50% minority student enrollments (6,12,19,25,King), twenty of the district's forty-six minority elementary school teachers were employed. Two schools in particular — School 19 (83% minority) and King

(57% minority) — employed 26% of the district's elementary school minority staff. In contrast, seventeen elementary schools had one or no minority staff members; eleven of these schools had at least 95% white student enrollments. On the middle school level, nineteen of the district's twenty-seven minority staff members were assigned to the three most heavily minority middle schools, all of which were located in Southwest Yonkers. A similar pattern existed at the high school level as well.

By 1972-73, this disproportion had become even more pronounced. Schools 6,12,19,25 and King now employed thirty-six, or 54%, of the district's sixty-seven elementary school minority staff. The three most heavily minority middle schools[125] employed 69% of the district's middle school minority staff, a disproportion similar to that which existed at the high school level.

The extent to which the increasing disproportion in minority staff at predominantly minority schools was the result of a deliberate "role model" policy is an issue of considerable dispute. The existence of a racially based assignment policy was fairly well-established in Yonkers public schools with respect to principals, whose assignment was governed by district officials rather than by collective bargaining agreement. Both Assistant Superintendent Stanley Schainker and Board member Rosemarie Siragusa acknowledged that minority principals were deliberately assigned to schools with greater minority student enrollments. Schainker Dep. 22, 224-25; Tr. 5427-28 (Siragusa). Other Board members who disavowed the existence of a "role model" policy did so only with respect to teachers rather than principals. Tr. 9844-45 (Minervini); Tr. 10,947 (Jacobson). Both Jacobson and Joseph Guerney, Director of Elementary Education, acknowledged that district officials had control over such assignments

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[125]This excludes the middle school staff of the Gorton (grades 7-12) facility, which in total employed 23 minority staff members.

unimpeded by the district's collective bargaining agreement with the teachers' union. Tr. 11,007; Tr. 11,517. As a result of the district's administrative staff assignment policy, all eight of the principals who were either hired or reassigned during Superintendent Alioto's tenure were placed in identifiably minority high schools. GX 464; Tr. 11,007-010 (Jacobson); Tr. 11,521-30 (Guerney). Of the thirteen minority principals and assistant principals in Yonkers in 1974-75, nine were assigned to predominantly minority schools and two others were assigned to Yonkers High School (42% minority), the district's most heavily minority school at that time. Prior to 1979, only one minority principal had been assigned to an identifiably white school, and this principal (Hattie Becton) was subsequently reassigned to King (90% minority at the time). GX 64; Tr. 11,008 (Jacobson). This assignment policy thus served to further establish Southwest Yonkers schools as identifiably minority schools.

The existence of a "role model" assignment policy for teachers, however, is not borne out by the weight of the evidence. The only clear evidence as to the existence of such a policy for teacher assignments was proffered by Board member Siragusa. According to Siragusa, this policy originated from Superintendent Alioto and Assistant Superintendent Schainker and was agreed to by the Board. Tr. 5427-28; Siragusa Stip. ¶¶ 2a-2c. Schainker acknowledged that the district's efforts to hire minority teachers occurred at a time when administrators "were operating under the assumption ... that minority youngsters need appropriate role models", but his testimony regarding the existence of a role model policy was concerned primarily with the district's hiring efforts with respect to administrative personnel. Schainker Dep. 22, 224-26. School principal Robert Dodson acknowledged that a segregative assignment policy was followed with respect to Special Education teachers, Tr. 13,018-19, but also testified that he was not instructed by Superintendent Alioto to assign minority teachers as role models in minority schools. Tr. 12,919. While Dodson's hiring efforts as Yonkers High School principal yielded an in-

crease in minority staff from eight (1970-71) to twenty-one (1974-75) and were supported by Alioto, Dodson recalled that Alioto had stated that "it was very important that all students, white and black, view blacks in professional roles. . . ." Tr. 12,919. And while Superintendent Robitaille acknowledged that the School 6 principal had sought to develop a staff with a racially "segregationist" attitude, he could not recall the existence of a general role model policy for teacher assignments and testified that such assignments, while frequently resulting in minority staff being placed in minority schools, were based on the staff member's years of experience. Tr. 4613-14. Finally, the Task Force for Quality Education's finding that there was an attempt at certain schools, such as King (53% minority faculty, 96% minority students, 1975-76), to place black teachers at predominantly minority schools, Tr. 3722 (Ross), this conclusion was drawn from an examination of statistical information and was not based on a finding that a general "role model" assignment policy existed for all Southwest Yonkers schools.

Several witnesses, including two Board members previously called as witnesses by plaintiffs, testified as to the absence of any such role model policy for teacher assignments. Board members Robert Jacobson and George Minervini disavowed the existence of such a policy, and Joseph Guerney, Director of Elementary Education, also testified to similar effect. Tr. 9844-45; Tr. 10,947; Tr. 11,235-37. In addition, three principals from South-west Yonkers schools all testified that they neither knew of nor practiced a "role model" policy. Tr. 12,589-90 (DiChiaro) (Commerce and Hawthorne Middle Schools); Tr. 13,243-44 (DeFino) (Schools 18 and 19); Tr. 13,487-88 (Steinberg) (School 19 and Hawthorne Middle School). Although principals were generally encouraged to hire minority staff, the record does not establish that only Southwest Yonkers principals were encouraged to do so. Schainker Dep. 22; Tr. 13,023 (Dodson). Thus, the record supports a finding that a "role model" policy was

not the reason for the disproportionate assignment of minority teachers to minority schools.

The absence of a "role model" assignment policy for teachers, however, does not compel the conclusion that the increased disproportion of minority staff at minority schools was fortuitous and unintentional. The foreseeability of the increased racial segregation of staff members and the district's limited efforts to alleviate the imbalance together suggest that the resulting assignment of minority staff to minority schools was a practice which the Board approved of and intended to continue. The combination of the frequent exercise of transfer rights in a largely west to east direction, the resulting increase in vacancies at disproportionately minority schools, the contemporaneous affirmative efforts to hire minority staff, and the district's failure to exercise its reassignment prerogative resulted, quite obviously, in the vast majority of minority faculty being assigned to Southwest Yonkers schools and essentially made the use of any more explicit "role model" policy unnecessary. Given the school district's deliberately segregative pattern of administrative staff assignments and the racial disproportionality in teacher assignments prior to the collective bargaining agreement, it is reasonable to infer that the subsequent pattern of assigning minority teachers to disproportionately minority schools was considered desirable and was deliberately unaltered.

By 1974-75, four of the five elementary schools with over 20% minority staff were at least 80% minority (6,12,19,King) and had black principals, while nine of the thirteen elementary schools with no minority faculty (and a white principal) were at least 97% white (8,11,15,16,17,21,28,29,32). The secondary schools were similarly disproportionate in minority staff representation; the three middle schools with over 10% minority staff were all over 50% minority (Longfellow, Hawthorne, Commerce), and the two high schools with over 10% minority staff were the district's most heavily minority high schools (Yonkers (42% minority) and

Gorton (30% minority)). These five schools employed 68% of the minority staff assigned to the district's thirteen secondary schools.

The district's affirmative hiring efforts during Superintendent Alioto's term were also accompanied by a steady flow of white teachers from Southwest to East Yonkers schools. As discussed previously, *see* SCHOOLS IV.B.2 *supra*, such transfers were induced primarily by the recognized and perceived preferability of teaching in educationally superior East Yonkers schools. Consequently, the number of minority teachers in predominantly white schools declined. None of the district's seventeen predominantly (greater than 90%) white elementary schools experienced an increase in the number of minorities on their faculty from 1971 to 1975; ten of these schools actually experienced declines in minority staff, and four others continued to employ no minority staff.

The district's staff assignment practices were marked by other discriminatory or otherwise negative features. The minority teachers who were assigned to East Yonkers schools were often Special Education teachers who were deliberately assigned to such schools because of the disproportionate number of minority students in Special Education classes. Tr. 13,018-19 (Dodson); *see also* Tr. 2408-09 (Guzzo). In addition, minority teachers who were employed in Yonkers public schools often taught non-academic subjects such as music, physical education, health, typing or home economics. GX 587 (Gorton); Tr. 2412-14, 2420 (Guzzo) (Franklin, Hawthorne, Yonkers High); Tr. 4287 (Hammer) (Whitman, Roosevelt); Tr. 13,151-52 (Dodson) (Yonkers High). The general west to east movement of teachers also resulted in the assignment of the bulk of the district's less experienced staff to heavily minority Southwest Yonkers schools. *See* SCHOOLS IV.B.2 *supra*.

While the Board was well aware of the significant racial imbalance in staff assignments, limited efforts were made to renegotiate the district's collective bargaining agreement so as to give the district more flexibility in assigning and/or transferring

teachers within the school system. While some discussion of the desirability of such an effort occurred at or about the beginning of Dr. Robitaille's superintendency in 1975, Tr. 5525-26 (Minervini); Tr. 5949 (Robitaille), these efforts were not only unsuccessful and, according to the district's chief labor negotiator, eventually abandoned in negotiations with the teachers' union, Tr. 13,174-75 (Dodson), but in 1977 the Board agreed to specific limitations on its ability to implement involuntary transfers of school teachers. *Compare* GX 795, at 32 *with* GX 110, at 33 (authorizing involuntary transfers only for health, safety, or other reasons in accordance with mutually understood past practices, or to provide students with unique educational skill or learning experience).

The Robitaille superintendency of 1975-78 was marked by a recognition of the aforementioned racial segregation of school staff, and limited efforts to rectify that condition. Superintendent Robitaille assigned to Joseph Guerney the responsibility of recruiting minority teachers for positions at East Yonkers schools and sought to assign at least one minority teacher to every public school in Yonkers. This effort was only minimally successful. The number of elementary schools with no minority staff was reduced from eleven (1975-76) to five (1978-79), and the number of minority staff in predominantly white East and Northwest Yonkers schools,[126] which had decreased from eighteen (1970-71) to nine (1974-75) during Superintendent Alioto's tenure, rose slightly to eleven (1978-79). These increases, however, were overshadowed by increased minority staff in heavily minority Southwest Yonkers schools. For example, the number of minority staff in predominantly minority Schools 6, 10, 19 and King increased from twenty-five (1974-75) to thirty-two (1978- 79). This increase in minority staff at Southwest Yonkers schools occurred despite the staff terminations implemented as part of the district's fiscally induced budget reductions of the mid-1970's,

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[126]Schools 4, 8, 11, 14, 15, 17, 21, 22, 26, 28, 29, 30, 31, and 32.

layoffs which affected most severely the less experienced minority teachers in Southwest Yonkers schools. *See* SCHOOLS IV.B *supra*. For example, School 6, whose minority faculty dropped from 47% (1975-76) to 14% (1980-81), suffered a 38% loss in its faculty as a result of the 1975-76 teacher layoffs. GX 64, 75.

By the end of Dr. Robitaille's superintendency, the racial identifiability of the school district's faculty remained clear. The five elementary schools with over 15% minority staff were Schools 6 (98% minority students), 10 (87%), 19 (78%), 25 (85%) and King (97%); the five elementary schools with no minority staff were Schools 8 (3% minority students), 17 (3%), 21 (3%), 29 (2%) and 32 (7%). King Elementary School alone had more minority staff (sixteen) than all of the East Yonkers elementary schools combined (seven). GX 64. A similar pattern existed at the secondary school level as well.

As of 1980, the disproportion in minority staff at minority schools was still fairly severe. The four elementary schools with over 20% minority staff (10,19,25,King) had from 79% to 97% minority student enrollments and employed thirty-four of the district's seventy-six minority elementary school staff. Over half (thirty-nine of seventy-six, or 51%) of the district's minority elementary school staff were assigned to five elementary schools with at least 70% minority enrollments. Of the five schools with no minority staff, four of them had at least 93% white student enrollments (17,21,29,32). The three middle schools with over 10% minority staff were Fermi (58% minority students), Longfellow (92%), and Hawthorne (64%). Although these schools employed less than half the total number of middle school staff in the district, they employed twenty-four of the thirty-nine[127] minority

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[127]This number actually overstates the number of minority middle school staff members in the district since it includes minority staff at the elementary school portion of the Emerson and Twain (grades K-8) facilities. Although separate staff data by race is unavailable for 1980, in 1978-79 Emerson and Twain had a total of 12 minority staff members, only eight of whom were middle school staff. GX 52.

middle school staff. On the high school level, the two schools with over 10% minority staff were Gorton (44% minority students) and Yonkers (56%), schools which employed forty-three of the district's fifty-six minority high school staff members. The distribution of minority principals and assistant principals, while improved from previous years, was still imbalanced even as late as 1980. Although the district had more schools with over 90% white enrollments than schools with greater than 50% minority enrollments, six of the district's eleven minority principals and assistant principals were assigned to predominantly minority schools while only three were assigned to over-90% white schools.

In sum, the racial disproportion in minority faculty and administrative staff assignments has been a constant feature of Yonkers public schools. The clearly foreseeable and foreseen effect of the district's affirmative hiring of minorities, when combined with the collective bargaining agreement's transfer provisions and the general west to east flow of white teachers, was to sharply increase the number of minority teachers in Southwest Yonkers schools. The district made no demonstrated efforts to invoke its reassignment powers to counterbalance this phenomenon and made limited and largely unsuccessful efforts to renegotiate the contractual provisions to which it bound itself in 1969. While we recognize the practical difficulties which would have accompanied such efforts, this does not excuse the Board's failure to take any significant and lasting steps to reverse the racial disproportion which existed prior to the 1969 agreement and which was solidified and intensified during subsequent years. *See* *Armstrong* v. *Brennan*, 539 F.2d 625, 635 (7th Cir. 1976), *vacated on other grounds*, 433 U.S. 672 (1977); *Morgan* v. *Kerrigan*, *supra*, 509 F.2d at 595-96; *Berry* v. *Benton Harbor*, *supra*, 442 F.Supp. at 1280, 1301. The Board's awareness of and acquiescence in the racial disproportionality of staff assignments is particularly troubling since neighborhood school policies, concern over transportation burdens, and patterns of residential segregation played no role in the formulation of staff, as opposed

to student, assignment policies and practices. *See Morgan* v. *Hennigan*, 379 F.Supp. 410, 456 (D.Mass.), *aff'd*, 509 F.2d 580 (1st Cir. 1974), *cert. denied*, 421 U.S. 963 (1975). The collective bargaining agreement, moreover, in no way explains the racially disproportionate pattern in staff assignments which had already become evident in years prior to the effective date of the first agreement, a disproportion which was apparent to school officials when the agreement was entered into. *See Armstrong* v. *Brennan*, *supra*. Such disproportion, in an area of public school operation in which residential segregation and student assignment-related concerns are essentially irrelevant, is of particular probative value in determining whether the racial segregation of teaching and administrative staff has been unlawfully created. *See Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 945. The collective bargaining agreement restrictions also cannot explain the deliberate assignment of principals and Special Education teachers on a race-conscious basis, a policy whose purported benevolence is outweighed by constitutional concerns of race neutrality. *See Diaz* v. *San Jose Unified School District*, *supra*, 733 F.2d at 670; *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 946. The aforementioned considerations persuade us that the assignment of disproportionate numbers of minority staff to predominantly minority Southwest Yonkers schools was in part the result of a desire to, and in fact did, create and perpetuate racial imbalance among Yonkers staff members consistent with the racial segregation of the Yonkers public schools, and had a segregative impact on those schools.

F. Refusal to Implement Desegragative Reorganization Plans

1. *Introduction*

Plaintiffs seek to establish the segregative intent of the Board and its liability for the segregation of Yonkers public schools based in part on its persistent refusal to adopt and implement proposals for desegregating the schools. Briefly stated, plaintiffs allege that the Board's responsiveness to racially motivated community opposition to such proposals was tantamount to an imper-

missible official recognition or effectuation of private discriminatory desires consistent with its other discriminatory acts and omissions, and thus forms the basis for holding the Board liable for the segregation which its conduct contributed to and maintained. Primary among the examples of such conduct is the Board's refusal to adopt the desegregative components of the 1972 NYU Report or the 1977 Phase II reorganization plan.

The nature of community opposition to, and the reasons underlying the Board's rejection of, the NYU Report proposals and the Phase II plan are best examined against the backdrop of prior desegregative efforts of the Board and school administration.

The desirability of reducing the increasingly severe racial imbalance in Yonkers public schools had been recognized well before the Board's consideration of proposals for desegregating the schools. In 1963, the New York State Commissioner of Education issued a letter to all state public school superintendents and board presidents in which he expanded upon previously articulated state policy concerning school desegregation and emphasized the necessity of insuring that racial imbalance, and its concomitant interference with the providing of equal educational opportunity, be eliminated.[128] In response, the Board issued a

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[128]The Commissioner stated that:

> The position of the Department, based on the policy of the Regents and the principals of the Commissioner's Advisory Committee, is that the racial imbalance existing in a school in which the enrollment is wholly or predominantly Negro interferes with the achievement of equality of educational opportunity and must therefore be eliminated from the schools of New York State.
>
> If this is to be accomplished, there must be corrective action in each community where such imbalance exists. In keeping with the principle of local control, it is the responsibility of the local school authorities in such communities to develop and implement the necessary plans. It is recognized that in some communities, residential patterns and other factors may present serious obstacles to the attainment of racially balanced schools. This does not, however, relieve the school authorities of their responsibility for doing everything within their power, consistent with the principles of sound eduction, to achieve an equitable balance.

GX 909.1.

resolution recognizing its commitment to the stated policies of state educational authorities and noted the responsibility of the community as well as the Board in alleviating racial imbalance in the schools and in pursuing efforts in other areas, such as housing, which also would achieve this goal. GX 924. At the time, the racial segregation of the Yonkers public schools was beginning to emerge. No predominantly minority schools existed at the time; on the elementary school level, however, the racial identifiability of School 6 (45% minority in 1961-62), 12 (41%) and 19 (32%), three elementary schools containing 47% of the district's minority elementary school children, was well-established by that time. Recognizing the state policy on segregation and the emerging racial imbalance of the schools, the Board, in 1966, notified the New York State Education Department of its interest in implementing a program to eliminate racial imbalance. GX 911.

In 1968 and 1969, the New York State Board of Regents reiterated its previously stated commitment to the elimination of racial segregation in the state's public schools. It noted the importance of eliminating racial segregation as a means of providing equal educational opportunity and stated its opposition to recently enacted state legislation prohibiting school boards from altering school boundaries or attendance zones for the purpose of eliminating racial segregation in the public schools — legislation which was subsequently declared unconstitutional. *See Lee* v. *Nyquist*, 318 F.Supp. 710 (1970), *aff'd* 402 U.S. 935 (1971).

The first significant recognition of the need to address the racial imbalance of Yonkers public schools occurred during the superintendency of Paul Mitchell. Mitchell expressed his concern that the racial segregation of the schools prevented students from receiving an equal education and was by all accounts deeply committed to rectifying this disparity. Tr. 4060-61 (Sobel); Tr. 4969-70 (Jacobson); Tr. 5203 (Morris); Tr. 13,136-37 (Dodson). During his brief tenure as superintendent, some initial steps were taken in recognition of the district's increasing racial imbalance.

These steps consisted primarily of the planned opening of the King Intermediate School and School 10 as racially integrated Southwest Yonkers schools; efforts to recruit minority staff; and a series of human relations workshops, conducted for teachers and administrative staff, which were designed to sensitize school personnel to the needs of minority students, particularly blacks. The workshops were also considered an initial step towards the eventual implementation of a desegregation plan for the district's schools. By this time, specific desegregation proposals began to be considered in the district. For instance, Superintendent Mitchell discussed with school principals the possibility of redrawing high school attendance zone lines on an east-west basis so as to improve racial balance in the district's high schools. Tr. 13,137-39 (Dodson).

During the 1969-70 school year, the district also sought the assistance of state education officials in addressing the problem of racial imbalance. Superintendent Mitchell met with Dr. Morton Sobel, a specialist in educational integration for the New York State Division of Intercultural Relations in Education, and secured Sobel's assistance in the district's initial integration efforts. Sobel discussed with school officials the district's proposed application for financial assistance from the state's "Racial Balance Fund" and suggested that the district establish a task force for purposes of evaluating the school district's racial imbalance and developing an integration plan. GX 914; Tr. 4059-60 (Sobel). In July 1970, two months after the Board adopted a resolution recognizing the need to address the problem of racial imbalance, GX 913, the district submitted an application for state financial aid for developing further plans for eliminating racial imbalance in addition to those steps which the district had already taken. GX 915. This application was granted and funds were provided to the district in September of 1970, just after the death of Superintendent Mitchell. GX 916.

During the spring and summer of 1970, Sobel also visited several schools in Yonkers and met with various teachers and administrators. He concluded that various educational deficiencies existed at the district's predominantly minority schools. Tr. 4072. Upon discussing these problems and proposals for desegregating the schools, however, Sobel was told by school officials that the community was opposed to desegregation of the schools. Tr. 4073, 4075. This community resistance was experienced firsthand by Sobel later that year when he returned to Yonkers to determine how the state money previously granted to the district was being used. Soble and Susan Morris, a vice president of the Council of PTA's, both recalled that at a Council of PTA's meeting held for the purpose of discussing school desegregation issues, remarks were made which reflected community opposition to the concept of school desegregation, opposition which was based partly on the perceived decline in the quality of education which would result in predominantly white East Yonkers schools. Tr. 4076-77 (Sobel); Tr. 5209-12 (Morris). This community resistance also was reflected in discussions which Sobel had with James Gallagher, the Acting Superintendent at the time. Despite the expressed concern of state officials that its funds were not being used as planned and that the Board not wait until a permanent replacement for Superintendent Mitchell was appointed before it began to address the problem of racial imbalance, Gallagher expressed his reluctance to pursue desegregation efforts because of the interim nature of his appointment and community resistance to such efforts. Tr. 4074-75 (Sobel). As a result, efforts to develop comprehensive proposals for alleviating the increasing racial imbalance among the district's public schools were essentially discontinued.

2. *NYU Report*

The district's shift in priorities from racial desegregation to educational improvement characterized the early to mid-1970's. Among the most comprehensive proposals for improving educa-

tional opportunities and reorganizing the district's schools were those set forth in a 1972 report prepared by a study team from the New York Univeristy School of Education. The NYU Report was the result of a variety of problems which Superintendent Alioto recognized upon joining the Yonkers School District in 1971. Alioto recognized the inconsistent grade organization in the schools, particularly at the elementary school level. He noted the limited accessability of occupational and vocational programs based primarily on the use of screening criteria at Saunders, the district's primary vocational education facility, and the limited availability of vocational and occupational programs at the district's regular secondary schools. In addition, he recognized the inequality of educational opportunity within the district, particularly with respect to the inadequate facilities and inexperienced teachers which characterized many of Southwest Yonkers' predominantly or disproportionately minority public schools. Finally, Alioto recognized the increasing racial imbalance in the schools and the need to address this condition.[129]

An additional element of the school district's reorganization plans involved the Gorton facility. The school had grown to be an increasingly minority facility as a result of the opening of Emerson Junior High School in 1963 and the resulting southern shift in Gorton's attendance zone boundary. During the late 1960's and early 1970's, Gorton began experiencing a series of racial disturbances caused in part by increasing student dissatisfaction with the nature and variety of eductional programs at the school. Both of these conditions contributed to Gorton's reputation as a racially troubled and educationally inferior school. Black students protested the recognized inadequacies of the school's non-academic, or general, program (GX 645; *see also* Alioto Dep. 70; GX 571) and complained that they were being steered into these programs by school officials. Tr. 4305-08, 4366 (Barrier); Tr. 13009-010

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[129]For discussion of Superintendent Alioto's concerns regarding the Special Education program, *see* SCHOOLS IV.D *supra*.

(Dodson); Peace, Jr. Stip. ¶¶ 6-8. While many of the problems cited by students were addressed by the district in accordance with an agreement entered into among Gorton students and school officials, for example, improvements in Afro-American curricular offerings and the creation of secondary school Human Relations Councils, GX 568, the inadequacy of the school's general program, and complaints of steering of minority students into the program, persisted. Alioto Dep. 70; Tr. 3892-94 (Ross); Tr. 4308, 4366-67 (Barrier); GX 571. These difficulties were compounded by the mixture of both junior and senior high school students at the school, a condition which had a negative impact particularly among the junior high school students at the facility. GX 586; Tr. 10,992-93 (Jacobson); Alioto Dep. 70-71.

Gorton's negative reputation increased as the aforementioned conditions persisted. The school's unstable condition reached a peak in 1971 and 1972 when the presence of police officers in the building became a fairly common occurrence and Acting Superintendent James Gallagher moved his office to Gorton in order to deal with the disturbances at the school. Tr. 4316-20 (Barrier). At the same time, the white student enrollment at Gorton began to decline, from 1,147 students in 1970 to 938 students in 1972, partly as a result of student fears concerning the continued disturbances at the school and the academic inadequacy of the Gorton general program. GX 570, 575, 584, 591, 593, 595.

Superintendent Alioto's response to these various problems was essentially two-fold. First, Alioto hired James Barrier, a black former police officer, to serve as his Special Consultant for Community Relations. Barrier's primary responsibility was to serve as a liaison between School officials and community members, with particular emphasis on communicating the concerns of the black community to school officials and alleviating the racial tensions at Gorton. Barrier also worked as a liaison between school officials and the police department and sought to minimize

the presence of police at the school. Tr. 4314-17 (Barrier); Alioto Dep. 66.

Barrier was also instructed by Superintendent Alioto to gather information on the extent of racial imbalance in the schools. Soon after, however, Barrier was told by Alioto to cease work in this area; based on Alioto's discussions with community members and school officials, Alioto believed that it would be politically infeasible to proceed with desegregative efforts in the schools at that time. Tr. 4325-26 (Barrier). Alioto's discussion with Barrier was consistent with a viewpoint Alioto had expressed to other school officials as well. According to Board member Robert Jacobson,

> There is no question [Alioto] said it and he said it to many people. He said it could never be sold in the Yonkers community. Any kind of totally city-wide racially balanced program would be politically infeasible.

Tr. 5054. Similarly, Dr. Morton Sobel recalled that in discussing the issue of school desegregation with Superintendent Alioto, he was informed by Alioto that "there was great community resistance and that it was unfeasible to try to develop a desegregation plan and then implement it." Tr. 4079. Alioto instead supported, and discussed with City officials, an approach to school desegregation which involved the use of scattered site housing within the city. Alioto Dep. 16-17.

Second, in October 1971 Superintendent Alioto commissioned the New York University School of Education's Center for Educational Research and Field Services to perform a study of the Yonkers public schools. The study team was asked to examine the physical capacity of school buildings, grade organization patterns, and educational program offerings, and was asked to make student enrollment projections as well, all with a view towards making recommendations for improving the structure and educational programs of Yonkers public schools. GX 115, at

iv. The study team was not asked to, and did not, address the issue of racial imbalance in the schools. Tr. 13,065-66, 13,093, 13,109-15 (Pitruzzello). Members of the study team, including Dr. Philip Pitruzzello, its director, visited the schools and spoke with principals and staff prior to the preparation of their report.

In March 1972, the New York University study team issued its report, "A Study of the Yonkers Public Schools: Facilities, Demography, Organization." GX 115. The NYU Report noted the limited nature of vocational and occupational programs in the district and the educational desirability of decentralizing these programs throughout the district's high schools. The Report also noted the related inadequacies of educational offerings in particular schools, for example, the non-academic, non-vocational general program, particularly at Gorton, which provided students "with few options . . . beyond the basic curriculum. . . ." *Id.* at 36. The Report then set forth several plans for addressing these problems, each including a number of overlapping recommendations. The primary recommendations fell into three general categories:

(1) A grade reorganization to a uniform K-5, 6-8, 9-12 grade structure. Under the district's then-existing grade structure, the schools lacked a consistent pattern of grade organization, with most sixth graders attending the district's elementary schools. Elementary schools included two K-3's, two K-4's, six K-5's, and twenty K-6's, along with King Intermediate (4-6) School. The four regular high schools included two 9-12 schools and two 10-12 schools. Consistent with superintendent Alioto's expressed desire for reorganizing the district's grade structure, the NYU Report recommended that the district reassign sixth graders to middle schools and expand the high schools to include ninth grade students.

(2) A high school "variable access" plan. Under this plan, particular occupational programs would be distributed among the district's regular high schools so that each school would have a

more comprehensive educational program. As part of this proposal, the North Yonkers (Roosevelt and Gorton) and South Yonkers (Lincoln and Yonkers) high schools would be paired so that students at one school could attend the other school on its geographic "tier", at which particular occupational programs would be available. The Report recommended closing the High School of Commerce and distributing its occupational courses among the district's regular high schools, and converting the Saunders Trades and Technical High School into an Occupational Area Center at which students from regular high schools could receive instruction in various advanced occupational programs. As an additional, alternative component of this proposal (Plan I of the Report), the Report suggested the conversion and physical expansion of Central Yonkers' Burroughs Junior High School into a districtwide high school at which technical and health programs would be offered. *Id.* at 36-40. The Report also proposed that School 5, located within two blocks of Burroughs, be converted into a replacement middle school for Burroughs, with School 5 students being reassigned to Schools 16, 17, 22, 24, and 25. *Id.* at 43.

(3) Reorganizing the district's Northwest Yonkers secondary schools. At the time the NYU Report was issued, Gorton was a combined junior and senior high school facility, Emerson was a combined elementary and junior high school facility, and Commerce was an occupational high school. Among the NYU Report proposals were (a) the relocation of Gorton High School to Emerson and the relocation of Emerson Elementary and Junior High School to Gorton (Plans I (*id.* at 40, 46) and II (*id.* at 47)); and (b) the relocation of Gorton Junior High School students to Commerce (with Commerce's occupational programs being distributed throughout the district's other high schools) (Plan III (*id.* at 49)).

Late in 1972, the district conducted a two-day retreat for purposes of discussing the recommendations of the NYU Report.

The contemporaneously prepared documents summarizing the opinions expressed at this conference reflect the controversial nature of the educational reforms proposed by the Report. GX 760-762. Virtually every facet of the school district's grade and program structure was critically examined. A number of alternatives to the NYU Report proposals were developed and discussed. Each proposal involved a multitude of recognized advantages and disadvantages, relating to educational wisdom, fiscal and political feasibility, community acceptance, space utilization, and racial impact. From these records, it is clear that the racial effects of the various proposals was a significant factor which was considered in evaluating the recommendations of the NYU Report and the alternatives suggested by the district's own administrative staff.

Race-related concerns were frequently expressed with respect to the proposed relocation of Gorton Junior High School students to a new Commerce Middle School. Specifically, the probability that Commerce would open as a virtually all-black middle school was repeatedly recognized as a disadvantage of the proposed movement of Gorton students to that facility. While the district was committed to alleviating the unrest at Gorton by removing junior high school students from the facility, the segregative impact of transferring them to Commerce was clearly foreseen. GX 760, at 44,936 ("Commerce may become an all-black school"), 44,938 ("Commerce could be all black"), 44,939 ("Commerce becoming basically a black school"); GX 762, at 42,820 ("Racial Distribution - all black"). As an alternative to the NYU Report's "Plan III" proposal, a task group suggested that students from Emerson could be assigned to Commerce along with Gorton Junior High School students and King sixth graders. GX 760, at 44,941. Proposals were made which contemplated the reassignment of all or part of the Emerson Junior High School student body to Commerce. GX 760, at 44,941; GX 761, at 42,808. This proposal was made for the purpose of improving the racial balance of Commerce and of West Yonkers schools in general, consistent with the wisely supported elimination of the

junior high school component at Gorton, *See* GX 760, at 44,939, 44,944. The proposed reassignment of Gorton High School and graduating Emerson Junior High School students to a newly converted Emerson High School facility, along with the conversion of Gorton into the new Saunders area occupational center, was also supported as a means of improving Gorton's negative image, improving racial balance among West Yonkers schools, and expanding the facilities available for occupational education programs. *Id.*

The closing of Emerson Elementary School, although not expressly examined in this regard, would have been feasible from a capacity standpoint. In light of both the anticipated decline in elementary school enrollment and the proposed K-6 to K-5 grade reorganization, the capacity of elementary schools in the Northwest Yonkers area, such as Schools 22, 16, 24, and 5, would likely have been sufficient to accomodate the anticipated K-5 enrollment at Emerson. In 1973-74, Emerson had 458 K-5 students; Schools 22, 16, 24 and 5 had available capacity for anywhere from 483 (Phase II) to 551 (Engineering Department) students. In addition, alternatives suggested by the district's task group contemplated either the construction of a new elementary school in the Emerson area or the reassignment of Emerson students to Schools 16 and 22, with School 16 students being reassigned to Schools 9 and 25. GX 760, at 44,941. The latter portion of this proposal in particular was considered desirable in that School 25 would be "notably improved." *Id.* at 44,944.

Despite the recognized advantages of the proposal to convert Emerson, the task group also recognized that it would be problematic primarily because of the anticipated resistance of the Emerson community to the proposal. GX 760, at 44,946-47. Specifically, school officials noted that the redistricting of Emerson Elementary School students would be "politically impossible" and would cause an "uproar" because of that community's resistance to being redistricted into neighboring school zones —

Schools 16, 22, and 25 — two of which (Schools 16 and 22) had previously enrolled students from the Emerson area. *Id.* School officials also expressed concern regarding the travel distance which Emerson Middle School students would have to endure in travelling to Commerce (maps indicate that the distance between the Emerson Middle School zone and Commerce varies from approximately one-and-a-half to four miles). School officials noted that the Emerson community would also be opposed to the creation of a high school in the area. *Id.* An additional criticism of the overall thrust of the proposal was that "the Gorton 'image' and racial imbalance are too prominent in this plan." *Id.* at 44,946.

Another proposal for alleviating the Gorton situation involved the reassignment of Gorton Junior High School students to Emerson. Alioto Dep. 71; Tr. 5221 (Morris); Tr. 5430-31 (Siragusa). This proposal was considered superior to the NYU Report's recommended use of Emerson as an expanded high school in terms of the adequacy of Emerson's physical facilities, while also preserving the previously recognized benefits of relieving Gorton of its junior high school student population. This plan, however, also would have entailed the reassignment of Emerson Elementary School students to neighboring schools in Northwest Yonkers, a proposal which, as noted previously, was viewed as problematic because of likely community opposition to such a plan.

The high school variable access proposal was equally controversial. Among the stated advantages of the proposal were the expansion of occupational education opportunities for students, improvement in the school district's racial balance, and the minimization of Gorton's negative image and the concomitant increase in West Yonkers property values. GX 760, at 44,935. Among the disadvangates recognized by school officials were the transportation burdens (time, cost, distance) involved, the elimination of the Saunders self-contained concept of providing vocational and occupational education instruction in one facility,

administrative and logistical difficulties, and the anticipated community opposition to the plan and its negative impact on East Yonkers property values. *Id.* at 44,936, 44,947, 44,953. A general resistance to change on the part of the community (and Saunders and Commerce alumni in particular) was considered as an impediment to successful implementation of the variable access plan. *Id.* at 44,936; GX 761, at 42,811.

In January 1973, four public hearings were held to discuss the NYU Report proposals. The recorded summaries of these hearings reveals strong community opposition to the proposals. GX 767; P-I 57-21, 57-23. Much of the opposition concerned the proposal to close Saunders and the High School of Commerce and to decentralize their vocational and occupational education programs throughout the district's regular high schools. In particular, community members expressed concern regarding the financial burdens which the decentralization of vocational and occupational programs would entail, as well as the transportation burdens which would be involved with respect to the proposed use of Saunders as an area occupational center. Similar transportation concerns were expressed with respect to the variable access component of the plan and the proposed conversion of School 5 from an elementary to middle school facility.[130] Written statements and notices of community members also reflected concern with the perceived "mass busing" called for by the Report. GX 765, 766, 769. This expression of opposition to busing was consistent with the Roosevelt High School (5% minority) community's expression of opposition two years earlier to the possibility of busing Roosevelt students to Lincoln High School (1% minority). SB 861.

Some recognition of the variable access proposal's racial implications was expressed at the hearings. One parent inter-

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[130]The proposed conversion of School 5 was also criticized by school officials and community members based on the perceived physical inadequacy of the facility as a middle school. GX 760, at 44,936; 765; 769.

preted the proposal simply as an attempt to improve racial balance. Another Northeast Yonkers resident suggested that high schools be paired on a north-south, rather than west-east, basis, based on the perceived lesser transportation burdens of such an alternative. P-I 57-23, at 44,660. While this suggestion was not explicitly race-related, most Northeast Yonkers residents would have endured a relatively lengthy trip regardless of the direction of transportation under the variable access plan. Although one reason for this suggestion may have been the perceived disparity in the educational quality of the district's East and West Yonkers high schools, Tr. 5217-23 (Morris), another parent recognized that "[i]f we divide East and West there would be a large racial imbalance." P-I 57-23, at 44,662.

The proposed reorganization of Emerson and Gorton also provoked opposition from community members. Opposition was expressed at the hearings to any proposal for reassigning Emerson students to Gorton, with parents suggesting they would refuse to send their children to Gorton. GX 767, at 42,842. Opposition to this proposal was articulated in other ways as well. For example, a flyer entitled "SAVE EMERSON" warned that converting Emerson into a secondary school for Emerson and Gorton students would mean that "*Students who attend Gorton would, therefore, come to the [Emerson] school*," GX 768 (emphasis in original), and that Emerson Elementary School students would be reassigned to Gorton or other schools in the area. *Id.*

The racial component of the opposition to the Emerson/Gorton reorganization proposals was recognized by several witnesses at trial. Board members recognized that racial concerns existed with respect to the proposed Gorton/Emerson redistricting, a concern which was consistent with the racially related concerns arising out of the redistricting of primarily white Homefield students to Gorton as part of the 1973 school reorganization. Tr. 5057-58 (Jacobson); Tr. 5509-10 (Minervini). PTA President Susan Morris also noted that racial opposition to the

NYU Report proposals existed particularly with respect to the Northwest Yonkers redistricting proposals. Tr. 5221-22. Board member Rosemarie Siragusa supported the proposed transfer of Emerson and Gorton students to a new Commerce Middle School but recognized the community opposition to that proposal, opposition which was expressed in terms of the safety of Emerson students having to travel to that area of the city as well as the lower academic standards which these students would experience as a consequence of that proposal. Tr. 5430-37.

Two weeks after the last public hearing on the NYU Report, Superintendent Alioto presented his 1973 Reorganization Plan to the Board. GX 114. In general, the Plan contained the least drastic and most segregative proposals which had been suggested both in the NYU Report itself and as alternatives to the Report proposals. The Plan recommended reorganizing the school district's grade structure to a uniform K-5, 6-8, 9-12 system, along with the addition of a pre-K program in the district's elementary schools. The Plan rejected the NYU Report's variable access approach to expanding vocational and occupational education opportunities. Instead, the Plan provided for the rehabilitation of, and additions to, the district's high school facilities (including Saunders) and the placement of a limited number of additional vocational and occupational programs in each of the district's regular high schools. The Plan recommended the addition of automotive shops and commercial lab space at Gorton, the addition of five occupational facilities and rehabilitation of science labs at Roosevelt, and the addition of occupational and automotive shops at Lincoln. According to the Plan, the new Yonkers High School, scheduled to open the following year, would be designed to include space for occupational facilities. As for the district's vocational schools, the Plan recommended the closing of the High School of Commerce and the decentralization of its commercial programs throughout the district's other high schools, and the rehabilitation and expansion of the Saunders facility, including the transfer of some of Commerce's technical programs

(*e.g.*, data processing, food trades, fashion design) to Saunders. According to the Plan, the purpose of the occupational education proposals was to provide academic students with an opportunity to obtain "hands on" experience previously unavailable in the district's high schools and to better prepare the non-academic student for the world of work. GX 114, at 22-23.

The 1973 Reorganization Plan also proposed two significant attendance zone boundary changes and related student reassignments. First, high school students and graduating Emerson Middle School students from the predominantly white Homefield neighborhood were reassigned from East Yonkers' Roosevelt High School (6% minority) to West Yonkers' Gorton High School (24% minority). The reassignment of Roosevelt students involved the redrawing of the attendance zone boundary dividing the Roosevelt and Gorton attendance areas. The simultaneous reassignment of Emerson graduates was in part the result of this boundary change (*i.e.*, for Emerson graduates living in the Homefield area) and in part the result of the overall conversion of the district's schools to a K-5, 6-8, 9-12 grade structure (*i.e.*, for other Emerson graduates). Second, the Plan recommended that Gorton Junior High School students be transferred to the Commerce facility. The Plan did not recommend the transfer of students from any other middle school to Commerce.

Superintendent Alioto concluded by proposing a three-year period for implementation of the reorganization plan. In March 1973, the Board approved the reorganization plan. GX 114, at 2.

As a result of the district's implementation of the 1973 Reorganization Plan rather than the NYU Report proposals, the evolving segregation of the district's schools remained substantially unaltered. No student movement between the district's regular high schools was effectuated despite the recognition that racial integration would be an advantageous result of the variable access plan. The Saunders facility remained intact despite the realization that the school's physical inadequacies and screening

process was presently resulting in the inaccessibility of vocational and occupational education opportunities to many minority students. The racially balanced High School of Commerce was closed and was replaced by a predominantly minority middle school. No desegregative reorganizations were effectuated at the elementary school level, as would have occurred under some of the NYU Report proposals.

While substantive differences between the NYU Report and the 1973 Reorganization Plan give rise to some doubt about the extent to which educational motives were responsible for the rejection of the NYU Report proposals, the 1973 Reorganization Plan itself was not devoid of educational justifiability. In issuing the Plan, Superintendent Alioto noted that, in his opinion, the NYU Report "overemphasize[d] the occupational training aspect of our instructional programs" and that he preferred instead to "focus on improvements that would affect both the academic and vocational training aspects of the Yonkers educational system." GX 114, at 10. In addition, while the closing of the High School of Commerce resulted in the loss of the district's most racially balanced (21% minority) high school, the decentralization of Commerce's technical and commercial programs was a valid educational objective which benefitted all of the district's other high schools and was in fact recommended in the NYU Report. The decision to maintain the bulk of the district's vocational programs in the Saunders facility rather than distribute them districtwide is partly a matter of educational philosophy (the self-contained vocational school versus the comprehensive high school) over which school officials may and did legitimately disagree. School officials did recognize the advantage of making these programs more accessible to a larger percentage of students, the recognized lack of minorities at Saunders, and the repeatedly acknowledged physical inadequacies of the Saunders facility. The plan, however, along with Superintendent Alioto's simultaneous efforts to alleviate the racially disproportionate impact of the Saunders screening process, *see* SCHOOLS IV.C *supra*, was

designed to address each of these concerns, albeit in more limited fashion than the NYU Report proposals.

The reasons underlying the rejection of the NYU Report proposals and adoption of the 1973 Reorganization Plan, however, go beyond those which were stated in the Plan itself. Indeed, previously expressed concerns of school officials which gave rise to the NYU Report itself are somewhat difficult to reconcile with the plan eventually adopted by the Board. Both Superintendent Alioto and Board member Robert Jacobson recognized that the 1973 Reorganization Plan, in recommending the partial duplication of occupational and vocational programs in each of the district's high schools, was more costly than the NYU Report proposals.[131] Tr. 11,074 (Jacobson); GX 114, at 36. While the district's willingness to expend more than would have been required under the NYU Report is not inherently unjustifiable, it is somewhat at odds with the prior characterization of various aspects of the NYU Report as advantageous (when costs would be lower) or disadvantageous (when costs would be higher). GX 760, at 44,935-37, 44,939, 44,945. In addition, the NYU Report proposals would have afforded substantially greater opportunity for equalizing educational opportunities for students attending the academically troubled Yonkers and Gorton High Schools, particularly for students in the schools' general programs, and would have resulted in more efficient and economical facility utilization with respect to the providing of vocational and occupational education programs. Tr. 13,060-67 (Pitruzzello); GX 760, at 44,395.

The testimony of school officials is consistent with the concerns expressed at the time of the 1973 Reorganization Plan and demonstrates that the rejection of the NYU Report proposals was substantially the result of the perceived political infeasibility

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[131]The cost of the NYU Report proposals ranged from $4.0 to $7.3 million; the 1973 Reorganization Plan carried an estimated cost of $9.8 million. GX 114, at 40.

of its adoption and implementation based primarily on the community's opposition to these proposals. According to Assistant Superintendent Stanley Schainker, a number of City Council members, in addition to community members and Saunders' staff and alumni, opposed the NYU Report recommendations, particularly the proposed conversion of Saunders into an area occupational center and the decentralization of its vocational and occupational programs. Schainker Dep. 39-45. Both Schainker's and Superintendent Alioto's description of the extent to which political considerations were taken into account in the administration's formulation of the 1973 Reorganization Plan reflect that the rejection of the NYU Report proposals was based in significant part on the perceived inability of obtaining City Council budgetary approval of the plan. Alioto Dep. 42; Schainker Dep. 44; *see also* GX 170. Their testimony also demonstrated that political considerations influenced not only the district's proposals concerning Saunders, but also the entire reorganization plan, in that the administration concluded that its insistence on widely unpopular proposals, apart from their educational merit, would endanger all other aspects of the plan. Alioto Dep. 41-43; Schainker Dep. 40-45.

The desegregative consequences of the NYU Report proposals were recognized both as an advantage and an impediment to their implementation. The racial implications of student movement between East and West Yonkers high schools were recognized by school officials as well as community members. Community members repeatedly voiced their opposition to "mass busing" even though the NYU Report proposals entailed no mandatory or involuntary student reassignments and even though many students were currently using similar methods of transportation to attend high school. Although the interschool transportation called for under the variable access proposal was characterized as unnecessarily disruptive and burdensome and was consistent with previously expressed community opposition to non-desegregative busing, several school officials who were in-

volved in the evaluation of the NYU Report proposals and were present at the public hearings concluded that opposition to the student reassignment provided for under the variable access proposal was also race-related in nature. Tr. 5222-24 (Morris); Tr. 5057-58, 11,073-74 (Jacobson); Alioto Dep. 45; Schainker Dep. 100-02; *see also* Tr. 4189-91 (Carman).[132] Schools officials also acknowledged that such concerns influenced the school district's rejection of the NYU Report proposals and its adoption of the 1973 Reorganization Plan, despite the recognized educational and fiscal validity of the NYU Report proposals. Tr. 5057-58 (Jacobson); Schainker Dep. 101-02.

Other concerns, although expressed in neutral terms, also carried with them race-related implications or overtones. Concerns regarding the decreased quality of education that would have resulted from the west to east movement of students, Tr. 5220 (Morris), while normally somewhat difficult to accept as entirely race-neutral, are even less credible in the context of the variable access proposal, where voluntary interschool movement of students would have occurred for purposes of receiving instruction in occupational and vocational education courses, rather than in traditional academic subjects such as English or math where disparities in achievement levels (as measured by achievement test scores) have existed among white and minority students in Yonkers public schools.

Another reason for the rejection of the NYU Report variable access proposal was the educational disparity between East and West Yonkers schools and the consequences which school officials believed would flow from implementation of a variable access plan in light of this disparity. Superintendent Alioto recognized the possibility that implementation of the variable

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[132]This opposition to busing, in the context of a variant of the magnet school concept, also bears relevance in evaluating the sincerity of facially race-neutral community opposition to the Phase II reorganization plan. *See* SCHOOLS IV.F.3 *infra*.

access plan at that time would have resulted in white flight from Yonkers public schools. According to Alioto, given the disparity in the educational quality of the district's high schools, the movement of students from East to West Yonkers schools would have resulted in the "abandonment of the public schools by the middle class and, therefore, would be counterproductive." Alioto Dep. 46-47. This concern was particularly evident with respect to the proposed Roosevelt-Gorton tier, in view of the recognized inadequacy of Gorton's general program as well as the recent disturbances at the school. While some of the disruptiveness at Gorton was remedied by removing junior high school students from the school, it cannot be said that the administration's evaluation of the community's perception of Gorton, and the likely consequences of this perception, was unreasonable; the existing disparities in the non-curricular aspects of the educational programs at Yonkers high schools made Alioto's assessment of the likely community response to the variable access plan a realistic one.

The record as a whole persuades this Court that at the time of the adoption of the 1973 Reorganization Plan, the Board's acts and omissions were designed in part to delay any comprehensive attempt to alleviate racial imbalance until such attempts could more readily be accepted by the community. The 1973 Reorganization Plan can best be characterized in the words of its principal drafter, as a comparatively limited, non-desegregative "first step" in reorganizing the structure and equalizing the educational opportunities afforded in the Yonkers public schools. Alioto Dep. 47; *see also* Tr. 5058 (Jacobson). The extent to which the Board's conduct in this instance represents part of a consistent and deliberate pattern of perpetuating racial imbalance rather than a sincere effort to improve the chances of achieving successful school desegregation in future years is more meaningfully evaluated by examining the Board's subsequent encounters with proposals for desegregative reorganization of the Yonkers public schools.

The overwhelming weight of credible evidence demonstrates that the Board's decision to transfer Gorton Junior High School students to Commerce was a known segregative act. The contemporaneous statements and testimony of school officials establishes that absent the reassignment of Emerson Junior High School students to Commerce, the new Commerce Middle School was very likely to be a predominantly minority school. Tr. 5437 (Siragusa); Tr. 12,660-62 (Dodson); *see also* GX 760, at 44,936, 44,938, 44,939; GX 762, at 42,820. Although Superintendent Alioto testified that there was a "good opportunity to integrate" Commerce upon its opening, Alioto Dep. 73-74, this conclusion was based primarily upon the school's previous ability, as a districtwide occupational education high school, to attract a substantial white female population to the school's special technical programs and is somewhat inconsistent with his earlier recognition that his staff had concluded that Commerce would be a predominantly minority school. *See id.* at 70-71. In any event, this testimony is not consistent with the weight of other evidence demonstrating the administration's contemporaneous recognition that the reassignment of Gorton Junior High School students to Commerce would result in the creation of a predominantly black school.[133]

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[133]In this connection, we reject Dr. Armor's conclusion that the Commerce opening and related attendance zone changes were significantly desegregative. Dr. Armor's conclusion rests on the fact that the Commerce opening and subsequent reassignments from Hawthorne and Longfellow resulted in four schools which were more similar in terms of percentage minority enrollment (Commerce-70%, Fermi-41%, Hawthorne-59%, Longfellow-76%) than was previously the case (Gorton-54%, Fermi-40%, Hawthorne-36%, Longfellow-79%). (The Hawthorne 36% figure may have been somewhat understated due to the possible miscount of hispanics as whites. Tr. 11,944 (Armor). Even making the unlikely assumption that no demographic changes occurred during 1974, however, Hawthorne's minority enrollment prior to the Commerce opening would not have been farther from the districtwide average than its minority enrollment subsequent to the Commerce opening). First, this analysis fails to recognize the impact, in terms of community perceptions and racial identifiability, of opening an additional predominantly minority school in Southwest Yonkers — a problem

(Footnote 133 continued on next page)

Commerce did in fact open in 1973 as a predominantly minority middle school, with a 53% minority enrollment (as compared to Gorton Junior High School's 41% minority enrollment the year before, and the 22% districtwide average). During Commerce Middle School's first year, the facility housed both reassigned Gorton Junior High School students as well as students still attending the High School of Commerce's occupational education programs. The middle school's attendance zone was the same as Gorton's previous junior high school boundaries.

One year later, Commerce Middle School's attendance zone boundary was expanded southward, extending as far south as the Getty Square area in the heart of Southwest Yonkers. As a result, additional students from the Longfellow and Hawthorne attendance zones were reassigned to Commerce, a decision which foreseeably aggravated the already significant racial imbalance at Commerce. GX 557. At the same time, the High School of Commerce was finally closed and its occupational programs were distributed to the district's regular high schools and to the Saunders Trades and Technical High School. Commerce's minority enrollment increased in 1974 to 70%, and subsequently increased to 77% by 1975-76, the year in which the Board decided to close the school.

The extent to which the opening of Commerce Middle School was an *intentionally* segregative act requires a more

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(Footnote 133 continued from previous page)

which was anticipated by school officials prior to the school's opening, was noted by school officals and community members at various times subsequent to its opening, GX 556, 557; Tr. 12,647 (DiChiaro), and eventually led to its closing, Tr. 4629 (Robitaille). Second, the above percentages reflect that each school (other than already heavily minority Longfellow) became more, rather than less, racially imbalanced when compared to the 22% minority districtwide average enrollment. Third, Dr. Armor acknowledged that because of the intraschool focus of his analysis, that is, how schools' racial enrollments changed relative to each other, his analysis would have yielded an even greater desegregative effect had fewer whites been involved in the above reassignments and had each of the aforementioned schools thus emerged with minority enrollments of 70%, 65%, 65%, and 76%, respectively. Tr. 12,101-03.

detailed inquiry into the alternatives considered and rejected by the Board. As an initial matter, we note that the decision to remove Gorton's junior high school students from the Gorton facility is not a matter of dispute. Based on the increasingly negative image of Gorton and the fact that the disturbances at the school were partly the result of the presence of junior high school students at the facility, the Board concluded that the reassignment of Gorton's junior high school students elsewhere in the district was necessary. What is disputed, however, is the manner in which these students were reassigned.

The proposed reassignment of all of Gorton's and Emerson's junior high school students to Commerce and the conversion of Emerson into a high school facility was recognized as troublesome in a number of race-neutral respects. The conversion of Emerson into a high school facility for Gorton High School and graduating Emerson Junior High School students was uniformly recognized as problematic based on the inadequacy of the Emerson facility as a high school. This proposal would also have been problematic in view of the substantial increase in the number of students who would have been enrolled at the school. While Emerson enrolled 1,296 students (618 in elementary school) in 1972-73, Emerson would have had a high school enrollment of approximately 1,400 students the following year (the enrollment at Gorton High School in 1973-74) under the aforementioned proposal. Additionally, the reassignment of Emerson Middle School students from the northernmost portions of the Emerson zone would have entailed a travel burden, in terms of both distance and terrain, which would have been among the most burdensome in the district. SB 627; GX 760, at 44,946. (The additional travel distance for students reassigned from Gorton to Commerce was relatively small in comparison). Finally, it is unlikely that community opposition to the closing of Emerson Elementary School and the reassignment of its students to neighboring schools was related to race. Portions of the Emerson Elementary School zone had previously been included in the

attendance zones for Schools 22 and 16, both of which were still virtually all-white (99% and 97%, respectively) in 1972-73. Schools 5 and 24 also were predominantly white (14% and 24% minority, respectively) and relatively free of the educational inadequacies of many Southwest Yonkers elementary schools; reassignment to either of these schools was thus unlikely to engender significant race-related opposition. Only to the extent that reassignment of Emerson students to School 25 (63% minority) was anticipated would a significant potential have existed for race-related community opposition to the closing of Emerson Elementary School.

The difficulties which attended the above proposal, however, do not similarly explain the Board's refusal to implement other feasible alternatives to the creation of an additional racially imbalanced middle school in Southwest Yonkers. The proposed reassignment of a portion of Emerson's 8% minority junior high school student population to Commerce would have substantially reduced the segregative effect of the Commerce opening and would have obviated any need to redraw the Longfellow or Hawthorne attendance zones so as to assign additional students to the underutilized Commerce facility. Under this proposal, the Emerson facility could have continued to operate as a combined elementary/junior high school facility and thus would have avoided the substantial community opposition either to closing the elementary school or to converting Emerson into a high school facility. This proposal also would have avoided the capacity and facility-related difficulties of converting Emerson into a high school facility; Gorton could have continued to serve, as it in fact did, as the Northwest Yonkers high school. Travel-related burdens of Emerson students reassigned to Commerce could also have been minimized by reassigning only those students living in the southernmost portion of the Emerson Junior High School zone. The distance which such students would have had to travel to attend school at Commerce would have been considerably less than that travelled by many of East Yonkers' Whitman, Bur-

roughs and Twain junior high school students at that time. In light of the above, it is reasonable to infer that race-related concerns of the community contributed to the failure to implement this proposal. Tr. 5221-22 (Morris); Tr. 5509-10 (Minervini); *see also* Tr. 5057 (Jacobson).

The decision to reassign Gorton students to Commerce, rather than Emerson, is also difficult to credibly explain without regard to the obvious racial consequences of such a decision. While Emerson may have been considered inadequate as a high school facility for an increasing number of students, we are not similarly convinced that this facility would have been inadequate as a middle school for a lesser number of students. The school was originally designed to be convertible into a junior high school facility, SB 851, was recognized as a beautiful and spacious facility by at least one Board member, Tr. 5431 (Siragusa), and was considered an "excellent junior high school facility" by members of the Gorton community as well. GX 605 (1967 letter to Board). The repeated proposals, made by school officials and community members alike, to close Emerson Elementary School and convert Emerson into an exclusively middle school facility also suggest that the 1973 proposal to reassign Gorton students to Emerson was feasible. *See, e.g.*, GX 98, at 16 (1977 Phase II proposal), 750 (1977 proposal by Director of Pupil Personnel Jerry Frank), 779 (1976 proposal by Yonkers NAACP President Winston Ross). We are thus not persuaded that Emerson was unsuitable as a middle school facility and thus unable to accomodate the reassignment of Gorton students to that school.

The alternative of reassigning Gorton students to Emerson was also feasible from a capacity standpoint. From 1967 to 1972, the Emerson facility housed over 1,300 students every year, reaching a high of 1,394 students (699 elementary, 695 junior high) in 1967. Under the aforementioned reorganization proposal, Emerson's enrollment would have decreased from 1,286 to approximately 1,000 students (the combined middle school enroll-

ment at Emerson and Commerce for 1973-74), with a probability of further decreases in future years due to anticipated overall declines in student enrollment. GX 115, at 125. To the extent that Emerson would nevertheless have been overcrowded as a result of the reassignment of Gorton Junior High School students, some of this overflow could have been fairly easily eliminated by reassigning some Gorton students to the nearby, recently opened Burroughs Middle School facility, whose enrollment had declined from 1,143 (1970-71) to 731 (1972-73).

The district's desire to avoid the additional "tensions" which the proposed reassignment of Gorton students to Emerson might have created, Alioto Dep. 71, is not inconsistent with the conclusion that racial concerns were a factor in the Board's failure to adopt this proposal. On the contrary, a number of subsequent incidents which occurred at Emerson confirm the existence of such concerns and their recognition by school officials. During the year in which the Board approved the 1973 Reorganization Plan, over one-third of the fifty-four minority students at Emerson Middle School were transferred to Burroughs in response to race-related concerns of the Emerson community regarding the presence of minority students at the school. According to Superintendent Alioto and James Barrier, this transfer was effectuated for the purpose of insuring the safety of minority students who had been enrolled at the school in light of altercations which had occurred between students at the school and the Emerson community's opposition to the attendance of minority students at Emerson. Tr. 4333-38 (Barrier);[134] Alioto Dep. 67-68. While

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[134]As Barrier described it, he received

> [c]alls from parents, white parents. It is amazing how if you hold a position as special assistant or special consultant people somehow or another, I mean, just assume that you're white. So they told me a number of things about what was happening, I mean, and what those monsters were doing up there.

Tr. 4334. In describing a subsequent meeting at Emerson attended by hundreds of community members, Barrier recalled that the topic of discussion was

(Footnote 134 continued on next page)

these minority students were assigned to predominantly white Burroughs Middle School (9% minority) in Central Yonkers, the segregative nature of the reassignment insofar as Emerson was concerned was consistent both with the school district's recognition of race-related resistance to any significant integration of Emerson students with minorities from the West Yonkers area, and with the race-related tensions which arose at Emerson three years later when minority students from Commerce were reassigned there. Tr. 2562-65 (Guzzo).

Superintendent Alioto's testimony that the reassignment of Gorton students to a separate facility was designed to provide them with an improved educational opportunity is not a persuasive explanation for the segregative opening of Commerce. First, this explanation is troublesome in light of the anticipated predominantly minority nature of the school and the attendant educational problems which typically existed at such schools — problems which Alioto recognized with respect to other Southwest Yonkers schools, Alioto Dep. 47-49, and which were quick to materialize at Commerce itself. GX 559, 561. Second, the primary reason underlying the removal of Gorton Junior High School students from the Gorton facility was the undersirable mixture of junior and senior high school students in the same school; the reassignment of Gorton students to Emerson would not have resulted in a similar problem. Third, there is little evidence to suggest that Gorton students would not have received

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(Footnote 134 continued from previous page)

> what can we do to bring back, I mean, our old Emerson High School to what it used to be. Now, I don't know what it used to be, I mean, at the time before we had not had black students, that many black students, I mean, to have involvement.

Tr. 4336. According to Barrier, Runyon Heights minority students told him

> that on their way home, I mean, people tried to run them off the road . . . everyday, I mean, there was somebody attempting to run them over, I mean, on the highway when they were on their way home, and I think the black students themselves had fear, I mean, that they were going to be hurt.
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> Tr. 4338.

an improved educational experience at Emerson. Finally, Alioto's explanation does not dispel the otherwise persuasive showing that racial considerations were a significant impediment to the reassignment of Gorton students in any desegregative fashion.

The Board's reliance upon two educational report recommendations in adopting the proposal to move Gorton students to Commerce does not compel a contrary conclusion. The NYU Report itself regarded the plan in which this particular proposal was contained (Plan III) as the "least desirable" plan because of its inconsistency with the educationally-related proposals suggested elsewhere in the report. GX 115, at 52. More significantly, neither this report nor the 1969 Master Plan for Occupational Education, GX 646, considered the racial impact of such a proposal, the potential community opposition to such a proposal and the reasons therefor, or the Board's reasons for implementing this proposal as against feasible alternatives.

In sum, we find that racial factors played a significant role in the Board's segregative opening of Commerce Middle School. *Cf. NAACP* v. *Lansing Board of Education*, *supra*, 559 F.2d at 1055-56; *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 934-36. The opening of the Commerce Middle School certainly did not reverse, and indeed the reasonable inference is that it reinforced, the image of Southwest Yonkers schools as inferior and predominantly minority schools, particularly in the minds of Northwest Yonkers residents whose children avoided attending school with the former Gorton Junior High School students for several years longer than would otherwise have been the case. The opening of Commerce Middle School was consistent with other segregative actions — the rezoning of white students from School 1 to School 22; the transfer of Runyon Heights students from Emerson to Burroughs; the pattern of segregative attendance zone changes between Schools 16 and 25 — which preserved for many years the ability of Northwest Yonkers students to attend virtually all-white public schools.

The Board's decision to redistrict the Homefield neighborhood is not inconsistent with our findings with respect to both the segregative opening of Commerce and the rejection of the NYU Report's variable access proposal. The stated reasons for the Homefield redistricting related to improving educational and program coordination and alleviating overcapacity at Roosevelt. GX 744; SB 167. The overcapacity explanation is confirmed by numerical evidence: in 1972-73 Roosevelt had 1,901 students and was thus surpassing its recommended capacity; Gorton, on the other hand, had only 945 high school students and substantial space as a result of the reassignment of its junior high school students to Commerce. Other evidence suggests that the redistricting was also designed as a desegregative measure. A school administration task group recommended a similar redistricting proposal as an alternative to the NYU Report, an alternative which was considered advantageous from a desegregative perspective. GX 760, at 44,941, 44,944, 44,948 (redistricting Roosevelt students to West Yonkers schools "gets more whites into the districts. The only way to save the west side of the city from turning entirely black. . ."). Two school officials similarly recalled that the Homefield redistricting was implemented in order to improve the racial balance at Gorton. Tr. 2535 (Guzzo); Tr. 9839-40 (Minervini).

The Homefield redistricting, however, was not fully implemented the following year. Although the boundary lines for North Yonkers high schools were redrawn in 1973, the district allowed some students to continue attending Roosevelt the following year. Thus, while seventy-two students from the Homefield area attended Gorton in 1973-74, thereby reducing the racial imbalance between North Yonkers' high schools, sixty students continued to attend Roosevelt, and thirty-seven of them attended despite the district's normal policy of permitting only "last grade" students — here, seniors at Roosevelt High School — to continue attending their former school in the aftermath of a school zone change. Tr. 13,444-45, 13,450-51 (Frank). While no direct evidence was

offered to explain the district's reasons for this policy departure, community members had strongly opposed the redistricting, citing a variety of concerns including transportation burdens, disparities in educational quality, and the types of students who attended Gorton. GX 191, 575, 579.[135] Several school officials also acknowledged that residents of the Homefield community had expressed what they considered to be partly race-related concerns regarding this redistricting plan. Tr. 5060-61 (Jacobson); Tr. 9839-40 (Minervini); *see also* Tr. 4421 (Butler). Thus, although the effect of this policy departure was relatively short-lived — only eleven or twelve students with Homefield addresses[136] have attended Roosevelt rather than Gorton since 1973 (Tr. 13,444-48 (Frank)), the delayed implementation of this reassignment is consistent with the Board's contemporaneous rejection of all other desegregative, more comprehensive reorganization proposals for Yonkers public schools.

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[135]This opposition also was manifested in the form of false addresses being used by reassigned Homefield students in order to avoid attending Gorton High School, as well as the use of psychological reasons as a basis for requesting an out-of-district transfer back to Roosevelt. These practices were fairly limited, Tr. 4420 (Butler) (about 20 students); Jungherr Dep. 8-9 (five to 20 students), and prompted the district to seek legal advice in an attempt to prevent the improper use of false addresses by Homefield students, GX 574; Tr. 13,462-63 (Frank), and thus do not constitute independent evidence of Board acquiescence in segregative community opposition to the Homefield redistricting.

[136]This number does not include Homefield students who used false addresses in order to attend Roosevelt rather than Gorton. Tr. 13,463 (Frank); *see* fn. 135 *supra*.

3. *Phase II*

The Board's most serious consideration of a proposal to desegregate the Yonkers public schools began in 1977 when Superintendent Robitaille's administration introduced the "Phase II" reorganization plan. This plan was designed to address the many problems, including racial imbalance, that remained largely unresolved after the implementation of the district's fiscally motivated school closings of the previous year. In order to properly evaluate the reasons for the Board's failure to adopt the desegregative aspects of Phase II, and the nature of the community opposition allegedly responsible therefor, a detailed description of Phase II is in order.

The Phase II plan was designed to address a variety of problems afflicting the Yonkers public schools: financial constraints resulting from the fiscal crisis of the prior years; a continuing decline in student enrollment within the district, due primarily to the declining birth rate of the last several years and the loss of students to private and parochial schools; the resulting underutilization of school facilities within the district; and racial imbalance throughout the school district.

The plan's recognition of the multifaceted problems affecting the school district mirrored the recommendations of the Task Force for Quality Education which, in June 1977, issued its final report. The report recognized the racial segregation of many of the district's schools and attributed this fact to "segregated housing patterns, socioeconomic deprivation, and systematic racism," GX 938, at 2, the last of which referred to societal attitudes. Tr. 8518 (Keith). The Task Force urged the Board to consider the school district's fiscal, enrollment and racial problems "not as separate problems, but symptoms of the ailment of a troubled school district." GX 938, at 7. The methods recommended for reducing racial imbalance included redrawn attendance zone lines, school closings (including the use of district-provided transportation for reassigned students), feeder

schools (so that elementary school students could all attend the same middle and high school), specialized high schools, human relations workshops, and increased hiring of minority faculty and staff. *Id.* at 7-11.

The brief history of the Task Force was marked by events which presaged the overwhelming community opposition to Phase II. The initial announcement of the committee's formation excluded any mention of integration based on a determination by Task Force members that its inclusion would arouse community hostility towards the Task Force's efforts. Tr. 3695 (Ross). The Task Force held numerous public meetings during December 1976 and the early months of 1977 despite similar concerns regarding the community opposition which such meetings might engender. Tr. 3748-50 (Ross). At these meetings, the anticipated resistance materialized. In addition to expressions of community opposition to busing, GX 935, East Yonkers community members expressed concern that the transfer of West Yonkers students to their schools would lead to a decline in educational standards and student achievement and would create disciplinary problems in their schools. Tr. 3613 (Ross, Task Force member); Tr. 5381-82 (Tobin, Task Force member); Tr. 12,978-80 (Dodson). Written concerns were also expressed to school officials that the Task Force was unduly concerned with racial imbalance and not sufficiently interested in improving the overall quality of education in Yonkers public schools. P-I 59-43, 59-44. In general, the work of the Task Force was greeted with less enthusiasm and support as time progressed, due primarily to the school district's fiscal emergency, *see* SCHOOLS IV.A.3.b *supra*, and changes in Board personnel, *see* SCHOOLS V.C *infra*. Upon issuing its report in June 1977, the Task Force was discharged.

In August 1977, Superintendent Robitaille and his administrative staff issued the "Phase II School Reorganization" plan. GX 98. Phase II incorporated some of the Task Force's recom-

mendations[137] and, like the Task Force's Report, recognized the interrelationship between the school district's fiscal enrollment, utilization and racial problems. The plan's recommendations included:

(1) a reorganization of the district's schools from a K-5, 6-8, 9-12 to a K-6, 7-8, 9-12 grade structure, (*i.e.*, moving sixth graders back into the elementary schools), a proposal designed in part to better utilize the district's school facilities;

(2) the closing of three of the school district's seven middle schools (Longfellow, Fermi, Burroughs) and the concomitant elimination of the K-6 portion of the Emerson Elementary/Middle School — recommendations made possible by the proposed grade reorganization described above;

(3) the relocation of the Saunders Trades and Technical High School to the Burroughs Middle School facility, a proposal prompted by the physical inadequacies of the Saunders facility and the infeasibility of constructing a new Saunders facility;

(4) the closing of School 6 (98% minority), with a concomitant northward expansion of its attendance zone and reassignment of its students to underutilized elementary schools for purposes of improving racial balance; and

(5) the Yonkers Plan for school desegregation.

The Yonkers Plan was based on the significant imbalance in racial enrollments and in school utilization. Superintendent Robitaille and his staff acknowledged that the district's general policy of assigning students on a "neighborhood school" basis had resulted in the racial imbalance of many of the district's elementary schools. The plan also noted the degree of flexibility inherent

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[137]Phase II did not include Task Force recommendations concerning special high school programs. It did, however, recommend the closing and relocation of Saunders, a recommendation which, as noted in text, *infra*, the Board eventually adopted and implemented.

in the neighborhood school concept, stating that the concept was not definable by school capacity, by the size of a school's student population, by the geographic area served by a school, by the student's ability to go home for lunch, or even by the distance between the school and the student's home. In addition, the plan emphasized the inefficiency of the district's facility and staff underutilization and the fiscal consequences of these conditions.[138] GX 98, at 24-27.

Under the Yonkers Plan, elementary and middle school attendance zones were to be redrawn so that each school would have a maximum of fifty-five to sixty students per grade, or approximately 500 students per elementary school; the size of each school's attendance zone would thus be determined by the relative population density surrounding each school. Students

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[138]The report stated:

> Sometimes one defines the neighborhood school as that area currently being served by a particular elementary school, but that raises several interesting points. At one time this city was served by a handful of schools; as the population increased, additional schools were built. When that happened, district lines changed, generally without fuss for one had a new building to attend. During the 1950's and 1960's district lines were in constant state of flux as schools were built to take care of the increase in school population. Now that the reverse is true, should not the reverse happen and district lines be modified when unneeded schools are removed from use?
>
> My point is simple and that is there is no precise definition of a neighborhood school in this country nor is this city. There is a considerable variance in size, number of classes, geographic area, distance from school, and even in cost of operation. For example, under our present setup we could have 35 children in a particular grade; that would cost us two teachers. In another nearby school we could have 55 children in the same grade and that would cost us two teachers. In the latter school we are educating 20 additional children for next to nothing! The same is true of operational costs; at the present time we have a principal and a secretary serving a school of around 300 pupils and in another school of 700 pupils we have a principal and a secretary. Obviously, one costs us much more.

GX 98, at 27.

residing inside a redrawn school attendance zone boundary would be assigned to the school contained within that boundary. Students residing outside the redrawn boundary would be transported by the district to another school so as to positively affect the racial balance of the receiving school. *Id.* at 28. The plan noted that under state law, the state would reimburse the City for 90% of the costs incurred in transporting elementary and middle school students assigned to schools more than one-and-a-half miles from home. *Id.* The anticipated result of the plan was more effective utilization of school facilities through the substantial elimination of over-utilized and underutilized schools, and the reduction of racial imbalance among elementary and, through feeder patterns, middle and senior high schools as well. The plan recommended that the district obtain professional consulting and computer assistance in order to designate specific students for reassignment. *Id.* The plan did estimate, however, that 20% or less of Yonkers' elementary public school students would be directly affected by the transportation plan. *Id.* at 28, 31.

The financial benefits of the Phase II plan were considerable. Phase II contemplated substantial savings in addition to those achieved through the school budget reductions of the prior year. According to the Phase II proposal, the 1976 closing of seven schools would save the City an estimated $17,500,000 over a ten year period. The proposed closing of Saunders and conversion of Burroughs into the district's vocational school entailed estimated expenditures totalling $2,500,000, or $17,500,000 less than the cost of constructing a new Saunders facility. According to the plan, the remainder of the Phase II proposals would result in net savings of $28,650,750 over a ten year span, stemming primarily from the recommended school closings and resulting consolidation of educational staff. Transportation costs arising out of the Yonkers Plan were estimated at $400,000 per year, 90% of which would be reimbursed by the state the following year. GX 98, at 22. These financial benefits were virtually unquestioned by the

Board and were not a source of significant controversy during the consideration of Phase II. Tr. 11,764 (O'Keefe).

The several months between the August 1977 issuance of Phase II and the March 1978 public hearings on the report were marked by what can best be characterized as overwhelming community opposition to the Plan. Among the several recommendations included in the Phase II report, the Yonkers Plan was clearly the primary object of attention. The manner in which community sentiment was expressed was multifaceted — a flyer proclaiming opposition to the proposed busing of minority students into East Yonkers schools and East Yonkers students into Southwest Yonkers schools (GX 903); letters warning that Phase II would lead to white flight from East Yonkers neighborhoods (GX 832, 838); a boycott of the schools in protest of the busing aspect of Phase II (GX 845); and written reports of various community groups (SB 659 (November 1977 report of Lincoln Park Taxpayers Association); SB 734 (March 1978 report of Taxpayers Organization of North East Yonkers); SB 759 (January 1978 position paper of Yonkers Federation of Teachers); GX 838 (January 1978 letter of Lincoln Park Taxpayers Association President); GX 842 (February 1978 position paper of Yonkers NAACP)). Virtually all of these reports expressed strong disapproval of the Phase II plan for reasons similar to some of those expressed at the public hearings held in March 1978, including the loss of neighborhood schools and the attendant burdens of such a loss; the lack of any improvement in the quality of education as a result of the plan; and the failure to present alternatives to the busing proposal. *Cf.* GX 842 (Yonkers NAACP position paper explaining its decision to file complaint with United States Department of Health, Education and Welfare concerning racial segregation of Yonkers public schools). These reports urged the Board to consider alternatives to Phase II, including magnet schools, open enrollment plans, and voluntary busing. SB 734, at 13; *see also* SB 660, at 2 (May 1978 position paper of Citizens Committee for Quality Education).

Other written expressions of opinion, however, reflected race-related opposition to the Phase II plan. GX 832 (letter to Superintendent Robitaille expressing concern that busing " 'blacks & hispanics' into our east side schools" would be detrimental to neighborhood and suggesting that Task Force be renamed " 'Racist Force us' to take our children and go!"); GX 838 (letter stating that community group was "unalterably opposed" to "compulsory (non-voluntary) busing for racial purposes as an end in itself"); GX 903 (flyer protesting busing of East Yonkers students and busing of "the black children (3,000 in number) to our neighborhood schools"); *see also* GX 616 (letter expressing opposition to busing students into Emerson Middle School).

Community members also expressed uncertainty about which students would be affected by the transportation element of the Phase II plan. Tr. 11,273-74 (Guerney). Superintendent Robitaille made efforts to alleviate this concern; specifically, he attended meetings in East Yonkers at which he explained that, based on school utilization and enrollment patterns, the transportation envisioned under the Yonkers plan would involve primarily west to east busing. Tr. 5908-09 (Robitaille); P-I 69-24. These efforts were consistent with the description of the plan's effects as reported by the Yonkers daily newspaper. GX 831.

In spite of the community's initial reaction to Phase II, the plan remained unaltered from the time of its submission to the Board to the public hearings the following spring. The Phase II plan received little formal consideration by the Board during this time. In October 1977, the Board hired an architect for the purpose of developing plans for the widely supported conversion of Burroughs into the new Saunders vocational school. SB 868. The Board held one public meeting early in 1978 to discuss the Phase II plan. Tr. 5903 (Robitaille). In January 1978, the Yonkers NAACP filed a formal complaint with the United States Department of Health, Education and Welfare regarding the

racial segregation of the Yonkers public schools. SB 758; Tr. 3957-58 (Ross). The NAACP was subsequently associated by some community members with the busing proposal contained in the administration's Phase II plan. GX 845, 903. In March, Board members James O'Keefe and Seelig Lester attended a conference in Albany at which they discussed the Buffalo school district's desegregation program with Buffalo's school superintendent. Tr. 13,660 (Lester); SB 612.

During the months preceding the public hearings on Phase II, the plan's lack of detail regarding the students who would be reassigned under the Yonkers Plan was discussed by school officials. Joseph Guerney, Director of Elementary Education, attempted to determine which students would be directly affected by the Yonkers Plan through the use of a pin map, an effort which proved unsuccessful. Tr. 11,312-13 (Guerney). Although several Board members recalled that they asked Superintendent Robitaille to provide greater detail concerning this aspect of the plan, Tr. 11,740 (O'Keefe); Tr. 13,581-82 (Lester), neither the Board nor the administration employed an outside consultant to assist in developing the desired level of specificity despite Guerney's recommendation that an outside consultant be retained and the Phase II plan's own recognition that such assistance would eventually be necessary to implement the plan. Tr. 11,329-30 (Guerney); GX 98, at 28. The testimony of Seelig Lester suggests that Board members disagreed with Superintendent Robitaille over whether greater specificity would, as a tactical matter, increase or decrease the chances for generating community support for the plan. Tr. 13,616-17. The Board eventually decided to leave the plan as it was in the hopes of generating community support conditioned on greater specificity, rather than pursue efforts to develop greater specificity prior to the public hearings on Phase II.

In March 1978, the Board[139] conducted four public hearings on Phase II at secondary schools in each of the city's four geographic quadrants. GX 943.1, 943.2, 945.2. While opposition to the plan was nearly universal, the nature of the opposition was somewhat more divergent. The hearing at Fermi Middle School in Southwest Yonkers was marked by substantial opposition to several aspects of Phase II, including the proposed closing of Fermi and School 34 (Emerson Elementary School) as well as the proposed K-5 to K-6 grade reorganization. Most of the discussion, however, consisted of almost unanimous opposition to the Yonkers Plan as a means of desegregating Yonkers public schools. Three reasons predominated: the disproportionate burden on West Yonkers students which individuals perceived to be a consequence of the plan and its related school closing proposals (GX 945.2, at 7,8,32);[140] a resistance to the plan's implicit recommendation that the quality of education for Southwest Yonkers students be improved by busing them to predominantly white East Yonkers schools rather than by improving West Yonkers schools themselves (*id.* at 5,14); and opposition to the assignment of students away from their neighborhood schools (*id.* at 4,14,28). Several persons suggested the use of magnet schools as an alternative to the plan's busing proposal. *Id.* at 9,11,32.

The hearing at Lincoln High School in East Yonkers was considerably more acrimonious. Much of the opposition was focused on the proposed use of busing. Numerous community members and spokespersons for various community organizations cited a variety of objections to the busing proposal, including the

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[139]By March 1978, the Board, with one exception (Robert Jacobson), consisted of persons appointed by Mayor Martinelli. Two months later, Jacobson, who was generally supportive of the district's desegregative efforts, was replaced by Robert Weiner, Mayor Martinelli's former campaign manager. *See* SCHOOLS V.C. *infra*.

[140]This opposition was consistent with previous expressions of Southwest Yonkers community opposition to Phase II. P-I 60-25.

perception that busing would not result in an improvement in the quality of education; safety and time considerations regarding the transportation of students to and from school; and the plan's potential for interfering with a student's ability to participate in extracurricular activities or to attend after-school religious classes. A number of speakers also suggested, and criticized the Phase II plan for failing to consider, alternative methods for achieving school desegregation, such as magnet schools, open enrollment or voluntary transfer plans. Several speakers warned that the implementation of the busing proposal would lead to white flight from East Yonkers schools and that they personally would refuse to allow their children to be bused to school. Several school officials also recalled hearing comments expressing the concern that the plan would result in Yonkers becoming "another Bronx," referring to the community deterioration and slumlike conditions associated with the increased minority population in New York City's northernmost borough, located just south of Yonkers. Tr. 2491-93 (Guzzo); Tr. 11,794 (O'Keefe); Lester Dep. 62-63; *see* HOUSING IV.B *supra.*[141]

Some of the opposition to Phase II was expressed in considerably more racially hostile form. This sentiment was most often evident in the audience's treatment of the small number of speakers who spoke in favor of the plan. The Chairman of the Yonkers Human Rights Commission was booed and shouted at throughout his presentation; upon mentioning *Brown* v. *Board of Education,* and the need for integration in the Yonkers public schools, he was booed, shouted at and was unable to complete his statement. GX 943.2, at 11-12. An elderly black woman, upon mentioning the prospect of busing from West to East Yonkers

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[141]Although the transcript of the Lincoln High School hearing does not incude comments referring to the Bronx, the consistent testimony of three witnesses on this point does support the finding that such concerns were expressed either at the Lincoln hearing (the transcript of which is incomplete; GX 943.2, at 41), at another hearing, or at other fora during the time the Phase II plan was being considered by the Board.

and the idea that children should learn from one another, was booed and shouted at to such an extent that the hearing was adjourned. *Id.* at 27-28. The President of the Yonkers Council of PTAs was booed when she stated that "[t]his is the first time I can ever say that I am ashamed that I am white." *Id.* at 45.

Other opponents of the plan also expressed what can fairly be described as attitudes with racial overtones. One speaker physically cut a miniature American flag (conduct which provoked an angry rebuke from Board member John Romano, who was present at the hearing) in an effort to show that "[o]ur flag has been torn apart," alluding to the "minority flag which refuses to get into the the main web of our country, our system, just like all other minorities had to do." *Id.* at 22-23. Another person spoke against the busing of School 30 students in Southeast Yonkers to other schools and noted the willingness to accept children from other areas "but with some reservations as to the total effect on the quality of education" at the school. *Id.* at 10. This opposition to the proposed reassignment of minority students to East Yonkers schools was consistent with other, more racially explicit expressions of similar sentiment at the time. *See* page 445 *supra*.[142]

Not surprisingly, no explicit racial epithets were used by persons making public statements at the hearings. *See Hart* v. *Community School Board, supra,* 512 F.2d at 50. However,

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[142]This opposition to the reassignment of minority students to East Yonkers schools is not inconsistent with community sentiment expressed at the time of the 1976 school closings. The relatively greater receptivity to having additional students attend East Yonkers schools was clearly understandable at the time of the 1976 school closings in light of the considerably more drastic and undesirable alternative of having one's own school closed as a result of the district's budget cutbacks, and the possibility that assignment of additional students to East Yonkers schools would enable community members to succeed in their efforts to reopen the schools. Tr. 11,753-54 (O'Keefe). In addition, as already discussed in text, after the 1976 school closings were implemented, the Task Force began to encounter community opposition to the prospect of reassigning Southwest Yonkers minority students to East Yonkers schools.

several witnesses testified that they heard community members make specific racial slurs both inside and outside the hearing room, including comments referring specifically to the possibility of minority students attending East Yonkers schools. Tr. 1003 (Iannacone) (comments included "they are going to send blacks, and they are going to send niggers and they are going to send spicks out here"); 12,990-93 (Dodson) (characterizing audience comments, including "We don't want those children", as "disgusting"); *see also* Roshkind Dep. 34, 65-66. In sum, there is substantial credible evidence that a significant amount of community opposition to Phase II, as articulated in the public record and within the hearing of several witnesses at trial, was racial in nature.

As noted previously, much community opposition to Phase II was expressed in terms of opposition to "busing." Given the history preceding the Phase II proposal, opposition to busing was understandable. The Yonkers School District had ceased to provide subsidized transportation in the 1930's; thus, unlike many other cities in the country faced with the problem of racial imbalance, Yonkers was not a community in which busing was a widespread and traditionally used form of free transportation. While the use of both public and privately-contracted bus transportation at the secondary school level has been a frequently used method of travelling to school in Yonkers, the use of buses has been relatively infrequent on the elementary school level. Even in these instances, the nature and extent of such transportation has been relatively modest in comparison to some of the transportation which was contemplated under Phase II. Many of the concerns expressed regarding the proposed busing of elementary school students were similar to those expressed by East Yonkers community members who protested the 1976 closing of Schools 4 and 15, where racial concerns were not a factor in the community's opposition to the Board's school closings and student reassignments. The fact that the 1976 school closings were so adamantly opposed, while not a complete explanation of the

community opposition to Phase II, is nevertheless evidence of the sincerity of the community's belief in the neighborhood school concept and of the concerns which were expressed regarding the potential loss of neighborhood schools.

Several other factors, however, persuade this Court that opposition to busing was partially pretextual in nature. First, several of the suggested alternatives to the Phase II plan also would have required transportation of students outside of their neighborhood school zone, suggesting that at least some of the race-neutral concerns which were expressed concerning the Yonkers plan were pretextual. A number of perceived problems with the Phase II plan, such as the infringement on a student's ability to participate in extracurricular activities, the time and distance aspects involved in attending a school outside of one's neighborhood, and the perceived lack of improvement in the quality of education, would have also existed under the "voluntary" busing or open enrollment plans suggested by some community and Board members.

The support expressed for desegregative alternatives to Phase II also was somewhat inconsistent with the community's previous attitude towards similar proposals in the district. The school district's initial efforts in 1970 to address the problem of racial imbalance were greeted by community resistance to the prospect of school desegregation. *See* SCHOOLS IV.F.1, IV.F.2 *supra*. The high school variable access plan recommended in the 1972 NYU Report, involving the creation of specific occupational and vocational programs at each of the district's high schools, was strongly opposed by community members in part for reasons similar to those expressed with respect to Phase II. Such opposition suggests not only that the prospect of voluntary transportation was in fact not regarded as desirable or acceptable but also that the community's endorsement of magnet schools or open enrollment plans was not entirely sincere. The community's reaction to the efforts of the Task Force was also indicative of its unreceptive

attitude toward school desegregation. Although the Task Force was responsible for exploring, and in fact recommended, a wide variety of methods for desegregating the schools, the Task Force, like the NYU Report proposals, was instead equated by some with "busing", an issue which became a primary focal point of community discussion. Tr. 3612-13 (Ross); Tr. 8363 (Keith); P-I 59-36, 59-43, 59-47A.

More importantly, the aforementioned race-neutral concerns about bus transportation also cannot satisfactorily explain the East Yonkers community's opposition to west to east transportation of predominantly minority students. While such sentiment was not the universally held position of East Yonkers citizens — some receptivity to the enrollment of minority students in East Yonkers schools was expressed — the frequent expression of such opposition both prior to and during the consideration of Phase II cannot be ignored. Such opposition, moreover, was consistent with the strong, longstanding community opposition to the location of subsidized housing in East Yonkers described previously in our findings. In sum, while some of the concerns expressed regarding busing were sincerely held and non-racial in origin, we also find that a significant amount of opposition to busing was pretextual and represented race-related opposition to the Phase II plan.

The testimony of Board members also demonstrates that community opposition was, in significant part, based on race. Although Board members generally recognized the loss of neighborhood schools as an important component of community opposition, racially influenced community opposition to Phase II was also recognized as a significant element of the community's resistance to the plan. Robert Jacobson, a past member of the Board who attended the Phase II hearings and met several times with Board members, stated that the Board believed, and that he was convinced, that the "basis of the community reaction — was racism." Tr. 5063. Quentin Hicks, the Board's only minority

member at the time of the Phase II proposal, testified to his conclusion that community members, whites and minorities alike, were opposed to racial integration in any form and that "[b]lack children must learn in black schools," a conclusion which was consistent with his observations concerning community reaction to the Phase II plan. Hicks Dep. 67-70, 145-46, 217; SB 815, at 30. Even Board members who testified that they did not believe race was a significant factor in community opposition to Phase II nevertheless acknowledged that at least some of the community opposition was racially based. Tr. 11,741-42, 11,794 (O'Keefe); Tr. 13,668 (Lester).

The testimony of other school officials similarly reflects that community opposition to Phase II was racially influenced. John Guzzo, Director of Secondary Education, recalled the community's resistance to the assignment of West Yonkers students to East Yonkers schools, and stated that he was "ashamed" at the comments he heard at the Lincoln High School hearing. Tr. 2488-92. Robert Dodson, Director of Special Services, also perceived community resistance to west to east busing based on comments and remarks he heard expressed at the Phase II hearings. Although he acknowledged that much of the publicly articulated opposition was based on an unwillingness to be bused from one's neighborhood school — a concept whose existence he questioned — much of the undercurrent at these hearings, including references to "those children" and comments which he characterized as "disgusting," convinced him that the public was generally unreceptive to relieving racial imbalance in the schools. Tr. 12,978-93. Dodson concluded that racial opposition to Phase II was substantially responsible for the Board's rejection of the plan. Tr. 13,144. The observations of Audrey Roshkind, at the time a Council of PTA's officer and subsequently a Board member, and Dominick Iannacone, former City Councilmember, led them to draw similar conclusions. Roshkind Dep. 69-74 (race was a factor in Phase II community opposition, partly based on fear of west to east busing); Tr. 1557-63 (Iannacone) (majority

of Phase II community opposition racially based and similar to community opposition to subsidized housing).

Dr. David Armor, the Board's expert witness, testified that, based on his examination of the Phase II hearing transcripts and tapes, the community opposition to Phase II was similar to the Los Angeles community's opposition to mandatory desegregation, opposition which he had concluded, after a detailed study of Los Angeles citizens,[143] was based on sincerely held, non-racial factors. Tr. 11,954-79. We have a number of difficulties with this analysis and with the conclusion reached by Dr. Armor based on this analysis, namely, that community opposition to Phase II was predominantly not racially motivated. Tr. 11,983. Dr. Armor's conclusion was based on what he concluded was substantial community support for the assignment of minority students to East Yonkers schools; the testimony of school officials, oral and written statements made both inside and outside the Phase II hearings, and the treatment of pro-Phase II speakers at the Lincoln hearing itself significantly undercut the validity of this factual premise. In addition, the substantial differences between the two communities compared by Dr. Armor, for example, the geographical size of the district (and resulting incremental burdens imposed by busing),[144] further limit the usefulness of this comparison in determining the nature of community opposition to Phase II. Thus, responses which may well have had a genuine basis in fact in Los Angeles may well have been inapposite, or at least less plausible, with respect to Yonkers. Similarly, community opposition based on a fear of creating "another Bronx," while meaningless in a comparison of the Los Angeles and Yonkers communities' reaction to desegregation plans, take on particular

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[143]The study involved the direct questioning of 1,600 to 1,800 parents in order to determine both their stated reasons for opposing various desegregation plans and the sincerity of their responses. Tr. 11,956-57 (Armor).

[144]The City of Los Angeles is approximately 250 square miles; Yonkers is approximately 21 square miles. Tr. 12,536 (Armor).

meaning in the context of this case. This distinction becomes even more significant in light of the prior history of partly pretextual opposition to subsidized housing in areas of the Yonkers community substantially the same as those most vocally opposed to Phase II — a factor which Dr. Armor conceded would be relevant in evaluating the sincerity of opposition to mandatory busing. Tr. 12,539. Finally, Dr. Armor's analysis did not take into consideration more privately-expressed sentiments and school officials' perceptions of community attitudes, both of which are of importance in determining the nature of community to Phase II.

Two of the proposals contained in Phase II were eventually adopted and implemented by the Board. First, in an April 1978 meeting held shortly after the public hearings on Phase II, the Board considered a resolution to relocate the Saunders Trades and Technical High School to the Burroughs facility. Over the objections of community members who claimed that the Board's separate consideration of this Phase II proposal was a "political move" and an attempt at "evading the integration issue," the Board unanimously adopted the resolution. GX 679. Burroughs was closed at the end of the 1977-78 school year, and Saunders was relocated to the Burroughs facility after the 1979-80 school year. Second, the Board eventually adopted a grade reorganization proposal similar to the one contained in Phase II.[145] In 1980, the district's schools were converted into K-6 elementary, 7-8 middle (except for Longfellow and Fermi, both of which continued to enroll sixth graders), and 9-12 high schools.

The Board's treatment of the desegregative components of Phase II, however, consisted of unanimous disapproval of the plan. In a May 1978 workshop meeting attended by Board members and Superintendent Robitaille, the various reasons for

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[145]The Board's approval of this reorganization followed the recommendation of Superintendent Raymond's Curriculum Advisory Committee and was consistent with the grade reorganization proposal set forth in Phase II. GX 87a; P-I 45-173.

community and Board opposition to Phase II were discussed. SB 815, 816.1, 816.2. The opposition of Board members was based primarily on criticisms already expressed by the community, namely, the opposition to busing as a means of achieving greater racial balance and the associated problems presented by the transportation of students away from their neighborhood schools. The Board's concern with busing centered around Phase II's reliance on mandatory, rather than voluntary, means of achieving desegregation. Board members cited the widespread community opposition to mandatory busing, including the opposition of minorities, as well as its potential for encouraging further declines in enrollment, or white flight, from the schools, as the primary reasons for the plan's infeasibility. Several Board members, however, also commented on the somewhat illogical nature of community opposition to the use of such transportation *per se*. SB 815, at 21 (O'Keefe) ("the busing issue ... I find hard to understand, because I ride around this city, particularly as I ride around other communities throughout this nation, and wonder why all these yellow buses are running around. If there is something so immoral and dirty and bad about putting a child on a bus and sending him to school, I have to ask the question to those people who would suggest that busing somehow by very essences is immoral, bad."); 27 (Lester) ("please stop using words like 'forced busing' ... everyplace in the State of New York, young people are forced to ride on buses to get to school — not for purposes of integration — not for purposes of correcting racial imbalance, for purposes of getting to school.").[146]

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[146]For an example of the pretextual nature of opposition to "forced busing", *see* Weiner Dep. 395-400. Weiner recognized that the hypothetical assignment of students three miles from their homes due to uneven population distribution was unobjectionable. In such a situation, students could choose from a variety of transportation options, including taking a bus; according to Weiner, such a plan would not involve "forced busing". However, when such assignments involve integrative objectives, Weiner characterized the use of buses to transport students to school in this situation as "forced busing".

Virtually every Board member also expressed preferences for other, voluntary methods of desegregation, most notably, the use of magnet schools and open enrollment plans. The educational virtues of magnet school programs were cited as the primary advantages of such plans. The discussion also reflected the Board members' perception that the process of school desegregation would have to be a slow and gradual one; the Board's discussion of magnet school programs focused on their recommended utility primarily at the high school level. *Id.* at 14 (Paradiso), 28 (Lester), 34-35 (Romano); *see also id.* at 30 (Hicks). Superintendent Robitaille noted that the magnet school alternatives contemplated by the Board would also entail transportation of students out of their neighborhood school zones, and that integration efforts which focused first on the high school level were particularly inadvisable. *Id.* at 30-31.

The Board's recognition of race-related resistance to school desegregation was limited primarily to the concerns expressed by Southwest Yonkers community members. Anne Bocik stated that minority students and administrators from minority schools "said that they would like to be with their own." *Id.* at 9. Quentin Hicks related that black parents had expressed concern about having their children transported out of their neighborhood to "roam in the white jungle on that bus" and stated that "as long as I'm on the school board I'll make sure it doesn't happen." *Id.* at 30.

On the whole, the thrust of the workshop discussion consisted of the Board's recognition of the community's unwillingness to countenance an involuntarily-imposed desegregation proposal, such as Phase II, and one which did not carry with it any perceived improvement in the quality of education.[147] No final

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[147]Concerns as to the time involved in busing students to school played relatively little role in the Board's consideration of the plan. Superintendent Robitaille and his staff had concluded that the use of transportation, rather than walking, would have shortened the time required for many students to travel to schools. Tr. 4698-99.

recommendations or resolutions were arrived at by the Board prior to the meeting's adjournment. None of the desegregative aspects of the Phase II plan was formally voted on, either at that meeting or at anytime thereafter.

The most immediate causes for the Board's failure to adopt Phase II thus consisted of a recognition of the infeasibility of its implementation over the strong objections of the community and a disagreement with the administration's choice of school desegregation methods. The Board workshop meeting and the trial record reflect the Board's recognition of the strong community opposition to Phase II, opposition which largely coincided with that of the Board members themselves. Several Board members also acknowledged the importance of community sentiment in formulating their position on Phase II and in developing an alternative to Phase II's desegregative proposals. Tr. 11,770-71 (O'Keefe); GX 843, at 2 (Paradiso); SB 815, at 17,19 (Spencer); Weiner Dep. 73, 309; *see also* Tr. 5065-66, 10,965-66 (Jacobson). Indeed, the possible recurrence of the threats and personal harassment which several Board members had experienced in the aftermath of the 1976 school closings placed considerable pressure on the Board during its consideration of Phase II. Tr. 5313-15 (Frauenfelder); Tr. 5065-66 (Jacobson). The overall conclusion of the Board was that a voluntary desegregation plan would be more acceptable to the community and more likely to achieve the Board's stated desegregative goal.

The initial failure to implement an alternative desegregation plan was also due primarily to a conflict between Superintendent Robitaille, who claimed that magnet schools were an inadequate and ineffective means of achieving school desegregation and involved fiscal burdens which would be problematic for the district, and Board members, who stated a belief in the efficacy of such desegregative methods. Thus, in the aftermath of the Phase II hearings and the Board workshop, Superintendent Robitaille continued to favor adoption of the Phase II plan up to the time of

his departure from the school district in June 1978. Tr. 4700 (Robitaille). During this time, however, school officials were also instructed by Superintendent Robitaille to investigate the use of magnet schools in other cities. These officials eventually submitted a report to Interim Superintendent John Humphrey subsequent to Dr. Robitaille's departure from the school district. Tr. 13,195-96, 13,276-77 (Dodson).

Superintendent Robitaille's departure from the district prompted an extensive search by the Board for a replacement. In the wake of Phase II's demise, the Board's stated objective was to hire an individual who was not committed to any particular desegregative method, such as Superintendent Robitaille's perceived commitment to busing, but was willing to consider a variety of approaches to the school desegregation issue. Tr. 13,079-81, 13,126-27 (Pitruzzello). After approximately nine months, the Board hired Dr. Joan Raymond, an assistant superintendent from Chicago who had been involved in integrating the faculty of the Chicago public schools, as the new Superintendent of Schools, a post she presently occupies.

The nature and extent of the Board's responsiveness to community opposition to school desegregation is discernible most clearly from the Board's acts and omissions between the time of Phase II's rejection in mid-1978 and the institution of this lawsuit two-and-a-half years later. Although Superintendent Robitaille's departure and the Board's search for a new superintendent hindered to some degree the district's ability to develop and implement desegregative school reforms, the Board, during the interim superintendency of John Humphrey (who was also a candidate for the Superintendent's position) and the superintendency of Joan Raymond, did virtually nothing either to implement any of the desegregative proposals suggested in Phase II or to develop and implement any of the desegregative alternatives suggested by the Board and community members. The failure to close either School 6 or Longfellow Middle School resulted in the perpetua-

tion of virtually all-minority schools (99% and 90% minority, respectively, in 1978-79) even though both schools were significantly underutilized, regarded as educationally inferior and physically inadequate, and had been recommended for closing on several prior occasions. Financial considerations also clearly justified the proposed school closings; the closing of a middle school in particular would have resulted in estimated savings of approximately $100,000 per year in operating costs, or approximately $500,000 per year in total costs. GX 98, at 22; Tr. 4679-80 (Robitaille).

We recognize that the decision to close a school is an unpopular one and that opposition to such school closings was expressed at at least one West Yonkers Phase II hearing. Yet the Board's failure to pursue such measures was in marked contrast to the Board's willingness, just two years earlier, to implement similarly cost-effective school closing proposals over substantial and similarly vigorous community opposition. While the Board was relatively steadfast in its decision to close schools in 1976 despite the strident protests of the affected communities regarding the loss of their neighborhood schools, the Board, faced with considerably less race-neutral opposition to Phase II, acted in a substantially more acquiescent fashion despite the school district's previously acknowledged commitment to rectifying the segregative conditions left unresolved by the 1976 school closings, its prior recognition that desegregation of the public schools was an important step towards equalization of educational opportunities in the district, and the financial consequences of the Board's inaction. A primary difference between the 1976 school closings and several Phase II proposals was the clearly desegregative impact of the contemplated reassignments from heavily minority schools, a factor which appears to have increased, rather than decreased, the Board's reluctance to close admittedly underutilized and physically inferior schools. It is reasonable to conclude that the Board's persistence in failing to implement any proposal for desegregating the schools was based in part on its awareness of

community opposition to the desegregative reassignment of Southwest Yonkers students which the Phase II proposals would have likely entailed.[148]

Similarly, the Board's professed enthusiasm for magnet school or open enrollment programs as desegregative alternatives to Phase II was followed by a marked absence of implementation efforts. No magnet school, open enrollment, or other voluntary desegregation plan was adopted at any time prior to the institution of this lawsuit.[149] Seelig Lester, although a self-acknowledged proponent of magnet schools who had previously helped create such schools as a deputy superintendent of schools in New York City, failed to make any such proposals and in fact opposed an open access proposal for the Yonkers high schools in 1980. Tr. 13,677. A proposal for an open enrollment plan received no response and was not pursued. Tr. 13,186-87 (Dodson). An oft-repeated suggestion that the district close Longfellow, made again in May 1979 by Robert Dodson to Superintendent Raymond, was not adopted. GX 754. As late as the summer of 1980, community opposition to racial integration was perceived as an obstacle to school desegregation efforts in Yonkers. Tr. 13,143 (Dodson). In short, despite indications that the Board recognized the need to address and remedy the racial segregation of the school district, the Board's conduct during the two-and-a-half years subsequent to the Phase II hearings and the three-and-a-half year period

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[148]As discussed earlier, community opposition to closing Fermi or Longfellow was also based on the perceived disproportion in transportation-related burdens which would have resulted and the suggested alternative of reassigning other middle school students to these schools. The Board's inaction with respect to both rationales is discussed in text *infra*.

[149]In August 1980, the Board adopted a high school open access plan for purposes of improving racial balance. P-I 60-46A. In view of the subsequent failure of the district to implement this plan and this Court's exclusion of post-complaint evidence concerning the reasons for this failure, we need not consider whether the Board's initial adoption of this plan constitutes evidence of meaningful efforts to address the problem of racial imbalance.

following the Plan's introduction, constitutes a pattern of inaction with respect to school desegregation quite inconsistent with the affirmative measures taken in the face of community opposition to the fiscally motivated school closings and budgetary cutbacks of 1976.[150]

Other circumstances suggest that the nature of the Board's responsiveness to community opposition was partly race-related. The Board was aware of the considerable amount of west to east busing contemplated under Phase II and thus could reasonably foresee that Phase II was not likely to result in any significant dismantling of the neighborhood school concept, as feared by East Yonkers community members. *See* pages 423a-24a *infra*. The Board's purported reliance on this expression of East Yonkers community opposition is thus difficult to reconcile with the predictable consequences of both the Phase II plan as a whole or some of its more limited desegregative aspects. While Southwest Yonkers residents also expressed considerable opposition to Phase II, this opposition was based not only on the potential loss of neighborhood schools but also on the perceived disproportionate burdens which would be imposed by the plan; there is little

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[150]The Board has proffered evidence concerning the implementation of a number of magnet school programs during the last three years as evidence of the sincerity of its desegregative intentions at the time of Phase II. *See* Court Exhibit A, September 19, 1984. As noted previously, it is this Court's judgment that events arising subsequent to the institution of this lawsuit are generally best dealt with at the remedial phase absent a showing that post-complaint conduct constitutes the continuation of an identifiable pattern of action or inaction which commenced prior to the filing of this lawsuit. *See* fn. 80 *supra*. In this particular instance, we fail to see how the implementation of these programs, over four years after the Board's consideration of Phase II, is directly traceable to a pattern of pre-1980 conduct such that it should be presently considered as relevant to liability. Among the most significant intervening events occurring between the Board's rejection of Phase II and the subsequent creation of magnet schools are the institution of this action in 1980 and the rejection of a high school integration plan in 1981 — events which in our opinion weigh against our finding that a meaningful connection exists between the rejection of Phase II and the implementation of these magnet school programs.

evidence, however, to suggest that the Board's failure to adopt Phase II was based in any significant part on this concern. Instead, evidence of the Board's recognition of Southwest Yonkers community opposition was more directly related to race-related considerations, considerations which cannot be relied upon as neutral reasons for failing to adopt all or part of Phase II.

The perceived absence of an improvement in the quality of education also cannot explain the Board's treatment of Phase II in light of its rejection of that plan coupled with its subsequent inaction. We have little doubt that part of the community's opposition to Phase II was based on the educational inequality between East and West Yonkers schools; apart from race-related factors, students in East Yonkers would have had little reason to express enthusiasm for attending what were widely regarded by both community members and school officials as educationally inferior schools. The Board's rejection of Phase II and its subsequent inaction, however, does not reflect a legitimate, race-neutral recognition of the educational concerns of either East or West Yonkers residents. The substantial west to east movement of students provided for under Phase II would likely have improved educational opportunities for those students previously attending smaller, more crowded and educationally inferior schools. The magnet school programs so frequently mentioned as preferable, more educationally valuable desegregative tools were noticeably absent in the years following the Board's consideration of Phase II. Other alternatives suggested by community members, such as open enrollment or voluntary transfer plans, not only were not approved or implemented but also would have presumably failed to avoid the perceived educational deficiencies of the Phase II transportation plan. The Board's failure to implement either all or part of Phase II, or any alternative plan which would have been consistent with the legitimate educational concerns of the community, undermines the credibility of the aforementioned race-neutral explanation for the Board's perpetuation of racial imbalance in the Yonkers public schools.

The Phase II plan's self-acknowledged lack of specificity does not adequately and credibly explain the Board's refusal to adopt Phase II. The community's expression of concerns regarding who would be affected by the plan does lend credence to the non-racial aspect of community opposition to Phase II: if the question of whether someone would be directly affected by the plan was considered relevant or important in determining one's reaction to the plan, such a concern would suggest that opposition was premised in part on being bused out of one's neighborhood school zone, rather than having others bused into one's school. In addition, although the plan expressly called for the closing of Southwest Yonkers' School 6, Longfellow Middle School and Fermi Middle School, and thus contemplated at least some west to east busing, the relative underutilization of East Yonkers school facilities and the retention of sixth graders in elementary school (as recommended in Phase II) are factors whose effect may not have been easily predictable by community members.

The community's expression of specificity concerns, however, does not explain the Board's conduct with respect to Phase II. While the significance of enrollment and utilization data may not have been so easily discerned by community members, the Board was certainly aware of what was likely to be the predominantly west to east direction of student movement under Phase II. The Board recognized as a general matter that Southwest Yonkers schools were relatively crowded and that three of them were recommended for closing, while East Yonkers schools were relatively underutilized and none were recommended for closing. Tr. 11,790-91 (O'Keefe). Joseph Guerney had estimated that approximately 1,800 to 2,000 students would have been bused under the Yonkers Plan, and that the closing of School 6 (with its expanded boundary) alone would have accounted for at least 300 of those students. Tr. 11,296-97; GX 82, 83. Student enrollment and school capacity data for the following (1978-79) school year also reveals the extent to which transportation would have been in a predominantly west to east (or to a more limited extent,

southwest to northwest) direction. Using the Phase II report's capacity figures, the three most underutilized elementary schools in the district (approximately 50% of capacity) were all at least 93% white schools, two in Northeast Yonkers (26,32) and one in Northwest Yonkers (22). Of the next seven most underutilized schools (50-60% capacity), five (8,17,28,29,31) were in East Yonkers, one (34) was in Northwest Yonkers, and the only school in Southwest Yonkers operating below 60% capacity — 99% minority School 6 — was recommended for closing and thus likely would have been a source of west to east busing. Of the thirteen most underutilized schools (at or below 70% of capacity), only two (16,25) were in or near Southwest Yonkers; of the six most fully utilized (at least 80%) schools, all were in Southwest Yonkers, and five of them were over 40% minority. (The exception was School 13, a 32% minority school in the southeasternmost portion of Southwest Yonkers). Thus, although the precise quantification and identification of students who would have been directly affected by the Yonkers Plan is not revealed by the above data, the overall trend is fairly clear.

The allegedly uncertain effect of retaining sixth graders at the elementary school level also does not credibly explain the Board's purported specificity-based rejection of Phase II. The likely effect of the proposed grade reorganization is consistent with the conclusion that most busing would have been in a west to east direction. Six Northeast Yonkers elementary schools (8,26,28,29,31,32), all of which were under 60% capacity, were already K-6 elementary schools and thus would have been unaffected by the grade reorganization. In addition, the retention of sixth graders at the elementary school level would have affected Southwest as well as Southeast Yonkers elementary schools: Southeast Yonkers elementary schools had an average of sixty-eight fifth grade students (12% of their average capacity) in 1977-78 who would have remained at these schools under the Phase II plan; Southwest Yonkers elementary schools (not including

School 6) had an average of eighty-one fifth grade students, also 12% of their average capacity.

Any perceived lack of specificity became a clearly subsidiary concern subsequent to the public hearings on Phase II. The issue of specificity was virtually absent from both the Phase II public hearings and the Board's May 1978 workshop meeting and was simply not pursued when community opposition to Phase II became clear. The Board's failure to resolve the specificity issue subsequent to the public hearings on Phase II, along with the far more frequent expression of substantive objections to the Phase II plan, persuade us that the Board's rejection of Phase II was not attributable in any significant way to the plan's lack of specificity.

The Board's failure to implement all or part of Phase II's desegregative proposals, or any alternatives to these proposals, is in many respects consistent with the Board's previous failure to implement desegregative reorganization proposals and the district's recognition of the community's resistance to school desegregation. Beginning in 1970, the record discloses an awareness by school officials of the community's opposition to desegregation and a concomitant failure by school officials to adopt and implement educationally and fiscally sound proposals which would have helped rectify the recognized racial imbalance in the district. While the initial failure to pursue or implement desegregative school reorganization proposals was premised on the purported infeasibility of their present implementation, the refusal to implement such proposals in the late 1970's occurred in temporal and factual context which renders a finding of deliberate perpetuation of racial segregation appropriate: the increased racial imbalance among the district's schools; the increasingly visible racial opposition to correcting this condition; the increased demands for desegregative action; an increasing realization that such action was an important ingredient in eliminating disparities in educational opportunities in the district; a community increasingly afflicted by segregative governmental housing practices animated

by community opposition to the presence of subsidized housing in areas outside of Southwest Yonkers; and the failure to address the problem of racial imbalance in the schools in any meaningful fashion in the years following the rejection of Phase II in a manner consistent with the Board's stated reasons for rejecting the plan. In our view, the record makes clear that the initial reluctance to implement desegregative school reorganization plans evolved into a persistent failure to adopt measures to correct recognized educational and racial imbalances in the district in part because of their desegregative consequences. From the foregoing, we find the Board's failure to meaningfully address the problem of racial imbalance subsequent to its consideration of Phase II is more readily explainable as a reflection of the community's resistance to desegregation rather than the race-neutral concerns of the community.

The only desegregative student reassignment made by the Board in the aftermath of Phase II involved the reassignment of predominantly minority Runyon Heights students to Whitman Middle School (5% minority) in Northeast Yonkers. This reassignment occurred as a consequence of the Board's decision to convert Burroughs Middle School into the new Saunders facility. The reassignment of Runyon Heights students had been anticipated by NAACP member Herman Keith, among others, before the Phase II hearings, in light of the strong community support for the relocation of Saunders to Burroughs. At a February 1978 meeting of the Advisory Council for Occupational Education, Keith (a member of the Council) expressed his concern that this reassignment would be burdensome for Runyon Heights students and urged that the Saunders proposal not be treated separately from the remainder of the Phase II Plan. GX 432. As Keith had anticipated, the Board eventually approved the Saunders proposal but rejected all of the desegregative components of the Phase II plan. Burrroughs students were reassigned to Whitman and Emerson Middle Schools, with the Runyon Heights community included in the new Whitman zone.

The actual effect of reassigning of Runyon Heights students to Whitman was considerably smaller than attendance zone maps might suggest. Parents from the Runyon Heights community expressed concerns about the cost and inconvenience of attending Whitman and urged school officials to allow students from this area to attend Emerson Middle School (32% minority) instead. Tr. 11,733-34 (O'Keefe). The district, however, adhered to its original decision to reassign such students to Whitman; students who still wished to attend Emerson were permitted to apply for an out-of-district transfer in accordance with the district's general attendance policy. GX 734; Frank Dep. 244-48. As a result, minority enrollment at Whitman increased from twenty-three students in 1977 to only thirty-seven students in 1978; although twenty-four minorities who attended Burroughs in 1977 as seventh graders were reassigned to Whitman and Emerson, Whitman's eighth grade minority enrollment in 1978 was only four students greater than its seventh grade minority enrollment during the preceding year. GX 53, 64. With the simultaneous reassignment of over 300 white students from Burroughs to Whitman, Whitman remained a 5% minority school in 1978.

The reassignment of Runyon Heights students was part of a more comprehensive reassignment of students living in the western portion of the Burroughs zone. This reassignment of Burroughs students began in 1977, prior to the development and consideration of the Phase II plan but in anticipation of the soon-to-be-proposed conversion of Burroughs into the new Saunders. First, the district reassigned Burroughs ninth graders to Roosevelt High School. GX 847; SB 810.7. Second, the district decided to eliminate the sixth grade at Burroughs: sixth graders living in the Burroughs zone attended their respective elementary schools (5,8,31,32), and approximately eighty-five students residing west of the Saw Mill River Parkway in the former School 24 zone were scheduled to attend Emerson Middle School. GX 743, 750, 847; Frank Dep. 242, 269-70. Third, the district decided to reassign Burroughs' current sixth graders, approximately sixty-nine in

number, to Emerson. GX 743. Thus, Burroughs was converted from a grade 6-9 junior high school in 1976-77 to a grade 7-8 middle school in 1977-78.

When Burroughs was closed as anticipated in 1978, parents from the former School 24 zone expressed conflicting preferences as to which middle school they wanted their children to attend the following year. Some parents, including members of the Runyon Heights community, wanted their children to attend Emerson (32% minority) in nearby Northwest Yonkers; other parents, residing in the westernmost portion of the former School 24 zone, asked to have their children assigned to Whitman (5% minority), located a considerably farther distance away in Northeast Yonkers on the other side of the Saw Mill River Parkway. The former group was concerned about the cost and inconvenience of having students travel over four miles to Whitman; the latter group expressed their desire that their children be permitted to attend Whitman along with the rest of their School 5 classmates who resided east of the parkway. Tr. 2502-04 (Guzzo); Frank Dep. 244-48.

The new middle school boundary line was redrawn along the parkway, thus including the westernmost portion of the former School 24 zone in Emerson's attendance zone. At the same time, the Board granted an option to approximately sixty-five or seventy students, some of whom resided in the westernmost portion of the Burroughs zone, to attend Whitman rather than Emerson. GX 734; Tr. 2577-78 (Guzzo); Frank Dep. 258-59. While the option was expressly granted for 1978 only, a majority of the students in this area have continued to attend Whitman by obtaining out-of-district transfers to the school. GX 734; Frank Dep. 244-48, 258-59. These students also have generally continued their secondary school education at Roosevelt High School (9% minority in 1980) in Northeast Yonkers, rather than at Gorton High School (47% minority in 1980) in Northwest Yonkers. Frank Dep. 258-59.

While the options to attend Whitman rather than Emerson was segregative in its impact, racial considerations do not appear to have been a factor in the district's initial decision to grant the options. John Guzzo testified that the granting of these options was readily permitted because of the wide disparity in available capacity at the two facilities at that time. Tr. 2577. His testimony is supported by the numerical evidence of student enrollments at the two schools: in 1977-78, Emerson had 784 students, or 92% of its middle school capacity; Whitman had 480 students, or 40% (Phase II) to 47% (Engineering Department) of its capacity. The following year, a significant disparity still existed: Emerson was operating at 102% capacity, while Whitman was operating at 68% to 80% capacity.

On the other hand, neither the assignment of Burroughs students to Whitman, nor the Whitman/Emerson option, can be satisfactorily reconciled with other student assignment alternatives rejected by the Board. The willingness to assign former Burroughs students over four miles to Whitman undermines the extent to which travel and distance concerns can satisfactorily explain the Board's persistent refusal to reassign other students in a similar fashion for desegregative purposes. These concerns are particularly unpersuasive with respect to the reassignment of students from some of Southwest Yonkers' more underutilized and physically inadequate facilities — for example, School 6 and Longfellow, which were recommended for closing in Phase II — for whom subsidized transportation would have been provided. The district's willingness to assign middle school students considerable distances from their homes primarily where such assignments bore no desegregative consequences is inconsistent with its failure to do so in circumstances where both racial and educational factors made such assignments advisable. The granting of options to attend Whitman rather than Emerson also does not explain the failure to consider transferring Burroughs students to Longfellow or Fermi, two predominantly minority and severely underutilized middle schools in Southwest Yonkers. *See*

SCHOOLS IV.A.3.c *supra*. Any desegregative effect which resulted from reassigning Runyon Heights students to Emerson or Whitman was thus clearly outweighed by the segregative reassignment of other Burroughs students to these two schools.

As a result of the Board's refusal to adopt any of the desegregative proposals of Phase II, the school district's acknowledged facility underutilization, educational inequality, and racial imbalance continued. By 1980, the district's schools, now organized primarily on a K-6, 7-8, 9-12 basis, were still operating at significantly disproportionate capacities. On the elementary school level, three schools were operating at less than 50% capacity — Schools 26, 31 and 32, all of which were predominantly white schools located in Northeast Yonkers. Of the next seven most underutilized schools (all below 60% capacity), four were at least 95% white schools in East Yonkers (8,17,28,29), two were 90% white schools in Northwest Yonkers (22,34), and the seventh was School 6, a 98% minority school which remained open despite its recognized physical inadequacies, severe underutilization and racial imbalance. In contrast, of the six most fully utilized elementary school facilities in the district (over 80% capacity), all of them were in Southwest Yonkers, and four of them were predominantly minority schools (10,18,27,King). (The other two were School 13 (38% minority) and School 23 (45% minority)). On the middle school level, the pattern was reversed: by far the two most fully utilized facilities were Emerson (94% capacity) and Twain (89% capacity), both of which served predominantly white neighborhoods which were closer to the severely underutilized and predominantly minority Longfellow school. Twain, a 4% minority school, also served neighborhoods which were roughly equidistant to the underutilized Fermi Middle School (62% minority) in Southwest Yonkers.

The costliness of such underutilization was not, and indeed cannot be, seriously disputed. The school district administration had recognized, and the Board was aware, that each elementary

school closing would have resulted in savings of approximately $200,000 to $250,000 per year; as noted previously, each middle school closing would have saved approximately $500,000 per year, including $100,000 per year in operating costs. Tr. 4679-80 (Robitaille); Tr. 11,605 (Guerney); GX 98, at 21-22; *see also* Fareri Dep. 157-60. Given the acknowledged fiscal instability of the City and school district and the projected decreases in future student enrollment, at least some efforts to redress this condition would normally have been expected. While fiscal imprudency or inefficient management and operation of a school system is not necessarily indicative of improper intent, the present record persuasively demonstrates departures from previously followed neutral considerations and a failure to rectify recognized educational and fiscal problems primarily where racial consquences were also present. The failure to adopt either Phase II or any desegregative portion of, or alternative to, the Phase II plan, or to remedy the recognized educational and school utilization disparities within the school system, thus transcends mere inefficiency or lack of sound educational judgment. The record demonstrates that racial factors were responsible in significant part for the Board's failure to alleviate the segregated condition of Yonkers public schools.

In sum, this Court concludes that racially related factors were in part responsible for the community opposition to Phase II and for the Board's subsequent failure to implement either this plan or any other desegregation proposal. We are fully mindful of the controversial nature of busing, the many responsible authorities who have propounded both its virtues and its shortcomings, and even legislative expressions regarding busing as an integrative tool of last resort. It is not the function of this Court to deal at this stage of the proceedings with this difficult sociopolitical and educational conflict. It is our duty, however, to determine whether the Board's conduct under the facts and circumstances of this case reflected what it perceived to be the partly racially influenced concerns or attitudes of others. Based on our review of the recorded and documented expressions of community opposition to

Phase II; the testimony of Board members and other school officials regarding the nature, both actual and perceived, of community opposition to Phase II; the objectively favorable financial and utilization-related benefits of the plan; the Board's failure to meaningfully respond to and implement the alternatives suggested by the community and by Board members themselves; the previous circumstances leading up to the Board's failure to implement Phase II or any other desegregative alternative, including the integration-related pronouncements of state education authorities; the Board's inconsistent treatment of busing for non-integrative purposes; and the inconsistency or unpersuasiveness of other proffered explanations for the Board's inaction, we find that the Board's failure to implement a desegregation plan for the Yonkers public schools was prompted in part by the community's racial resistance to school desegregation. The legal consequences of the Board's failure to desegregate the Yonkers public schools is a separate issue which is discussed below in our Conclusions of Law.

V. THE CITY

The operation of the Yonkers public school system is the legal responsibility of the Board of Education. In practical terms, however, the present condition of Yonkers public schools cannot be understood without examining the manner in which the City of Yonkers, through its elected officials, has been involved in educational affairs. A 1957 New York State Education Department study of the Yonkers public schools concluded that "[t]he people of Yonkers in actual fact have two boards of education operating their schools. The city council and manager constitute one board and the legally designated board of education the other." GX 45, at 17. The City's role in the operation of the school system and the racial consequences of the City's policies and practices concerning both housing and schools, are the subjects of the remainder of our findings.

A. Interrelationship Between Housing Practices and School Segregation

The impact of the City's housing practices has not been limited to the perpetuation and exacerbation of residential segregation in Yonkers. Rather, the City's pattern of confining subsidized housing to Southwest Yonkers and its persistent refusal to locate such housing in other areas of the city has contributed to the perpetuation of school segregation as well.

As with the impact of the City's site selection practices on residential segregation in Yonkers, the evidence suggests that the segregative impact of the City's housing practices on the schools was not purely inadvertent, unknowing or unavoidable. While the City is not responsible for the formulation of attendance zones or student assignment policies, it cannot credibly deny its awareness of the Board's adherence to a neighborhood school policy and the segregative impact of its housing practices on the schools in light of this fact. *E.g.*, Tr. 1100 (Yulish); Tr. 2884-85, 3097-99 (Arcaro); GX 385. On the contrary, the City persisted in its failure to pursue desegregative housing practices, such as scattered site housing, despite the suggestions of school officials and others that such practices were necessary to avoid the segregative impact of the City's geographically confined subsidized housing practices on Southwest Yonkers schools. Alioto Dep. 16-18; Tr. 4323-26 (Barrier); *see also* Tr. 13,150 (Dodson); GX 272, GX 1094.50 (1970 letter from homeowners' association to City Council and Mayor stating that "[t]he continuance of minority racial concentration in this or any other area can lead to a busing situation in the immediate future which all of us wish to avoid."); C-352. Indeed, the evidence demonstrates more directly that the City's aversion to the desegregative development of subsidized housing in Yonkers was based in part on community opposition to the racial impact which such housing would have had on the East and Northwest Yonkers community, including its schools. Tr. 986 (Iannacone); P-I 106-26 (GX 1063.13); *see also* HOUSING

VII *supra;* SCHOOLS V.E.1 *infra.* The City's segregative housing practices also were adhered to despite an awareness that these practices would result in the enrollment of additional students in physically inadequate Southwest Yonkers schools (*e.g.*, GX 198, 272, 385, 1095.9; P-I 110-9; SCHOOLS IV.A.2.b *supra*), a condition which resulted in districtwide disparities in school facility utilization and eventually led to the school district administration's formulation of the Phase II plan. That the Board failed to minimize or eliminate the impact of the City's housing practices on the schools in no way negates the fact that, as a factual matter, the City's housing practices contributed to the perpetuation and aggravation of residential segregation and the resulting segregation of the schools. The above evidence, together with the evidence of the City's intentional perpetuation of residential segregation, demonstrates that the City not only was aware of the overall impact of its subsidized housing practices on Yonkers public schools but also intended to preserve the racially segregative impact of these practices on the schools.

In addition to the testimony of the City's expert, Dr. Eric Hanushek, regarding the impact of the City's housing practices on minority residential patterns, the Board's expert, Dr. Armor, analyzed the impact of these practices on Yonkers public schools. Dr. Armor's analysis was designed to determine what the racial composition of particular schools would have been had particular subsidized housing projects not been built. Dr. Armor calculated the number of students (by race) in specific subsidized housing projects and in the school to which these students were assigned. He then recalculated the minority enrollment in the school by hypothetically removing the subsidized housing project and placing a vacant tract of land in its stead, thus reducing the school's enrollment by the number of students residing in the housing project.

Dr. Armor found that the removal of two subsidized housing projects in 1950 would have had no "significant" (5% or more)

impact on the minority enrollment in the schools to which these students were assigned. He found that the removal of four projects in 1960 would have had no significant impact on the affected schools for two projects, and a segregative impact (*i.e.*, a greater percentage minority student enrollment) for the other two projects (Schlobohm and Schools 6 and 12, and Mulford Gardens and School 12). He found that the removal of eight projects in 1970 would have had no significant impact on the affected schools for seven projects and a segregative impact for one project (Phillipse Towers and School 19). Finally, he found that the removal of nine projects in 1980 would have had no significant impact on the affected schools for seven projects and a desegregative impact for two projects (Schools 7 and 19). Based on the above analysis, Dr. Armor concluded that the placement of subsidized housing in Southwest Yonkers did not cause the Southwest Yonkers schools to become increasingly segregated. Tr. 11,882-900.

Like Dr. Hanushek's analysis, Dr. Armor's analysis unduly minimizes the confirmatory impact which the City's government-sponsored housing projects had on the already developing private residential segregation in the city and on the segregation of the schools. Even though the analysis established that minority population growth in subsidized housing projects was generally not more rapid than in their surrounding neighborhoods, it disregards the extent to which the City's geographically uniform selection of subsidized housing sites and the concomitant increase in the absolute number of minority students in particular schools both were likely to cause whites to leave the surrounding neighborhoods and discouraged whites from moving into those neighborhoods. Tr. 8211 (Pearce). In addition, Dr. Armor acknowledged that the obvious impact of the City's housing practices was to preserve the racial segregation of Southwest Yonkers schools in comparison to East and Northwest Yonkers schools. Dr. Armor recognized that schools in these latter two areas would have had significantly greater minority student enrollments if subsidized

housing projects with rent-ups similar to those which existed in Yonkers had been located in these areas. Tr. 11,900-01. In light of the above and our previous discussion of the segregative impact of the City's site selection practices, *see* HOUSING VI *supra*, we find that the evidence persuasively demonstrates that the City's housing practices were responsible in significant part for perpetuating and exacerbating the systemwide racial segregation of Yonkers public schools. *See also Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 968; *cf. Armstrong* v. *O'Connell*, 463 F.Supp. 1295, 1304 (E.D.Wis. 1979) (rejecting analysis by Dr. Armor of segregative impact of school board's discriminatory acts since analysis "assumes that . . . no other neutral and nondiscriminatory actions would have been taken", ignores psychological effects of discriminatory acts, and fails to consider that discriminatory conduct "may have an effect beyond that felt by the persons, or in the schools or districts of immediate impact").

With respect to the impact of school segregation on housing patterns, Dr. Armor also questioned the extent to which the racial composition of a school, apart from the racial composition of the surrounding neighborhood, was a significant factor in causing residential segregation. Tr. 12,156-57. Dr. Pearce, on the other hand, testified that the racial composition of a school was an important factor in shaping residential relocation and housing choices. Tr. 8211, 8307-08.

While the precise quantification of the impact of school segregation on housing patterns is an elusive task, the interrelationship between the racial composition of schools and the impact on residential segregation has been repeatedly recognized by courts examining the causes and effects of school segregation. *See Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 465 n.13; *Keyes* v. *School District No. 1*, *supra*, 413 U.S. at 202; *United States* v. *Board of School Commissioners of Indianapolis*, *supra*, 573 F.2d at 408-09 n.20; *NAACP* v. *Lansing Board of Education*, *supra*, 559 F.2d at 1049 n.9; *Armstrong* v. *O'Connell*,

supra, 463 F.Supp. at 1307; *Evans* v. *Buchanan*, 393 F.Supp. 428, 436-37 (D.Del.), *aff'd*, 423 U.S. 963 (1975); *Hart* v. *Community School Board of Brooklyn, New York School District # 21*, 383 F.Supp. 699, 706 (E.D.N.Y. 1974), *aff'd*, 512 F.2d 37 (2d Cir. 1975). As the courts noted in *Arthur* v. *Nyquist*, if school desegregation suits "have shown anything, they have demonstrated convincingly, in the words of Judge Weinstein, that '[h]ousing and school patterns feed on each other. The segregated schools discourage middle class whites from moving into the area and the segregated housing patterns lead to segregated schools.' *Hart* v. *Community School Board*, *supra*, 383 F.Supp. at 706." 415 F.Supp. at 968 (footnote omitted). Also probative of this phenomenon is the direct evidence indicating that City officials in Yonkers were aware of and in some instances attempted to accommodate the segregative consequences of this interrelationship through the alteration of school attendance zone lines. *See* SCHOOLS V.E.1 *infra*. We find that the racial segregation of Yonkers public schools, as in many other comunities, has contributed to the residential segregation of the City both in deterring relocation to and in encouraging relocation from areas with racially imbalanced minority schools.

To be sure, demographic residential patterns and perceptions regarding the quality of schools are also important factors in determining individual housing choices. *See* SCHOOLS IV.B.5 *supra*. Yet in a community such as Yonkers, where patterns of racial segregation closely parallel disparities in the educational quality of schools, it is unrealistic and impracticable to separate the impact of the racial composition of the schools on housing patterns from the community's perceptions regarding the relative educational opportunities available in Yonkers public schools. And to the extent that housing choices in Yonkers have been based on demographic features, the City's discriminatory housing practices have, as already noted, contributed to the segregative demographic patterns upon which such housing choices were based. It is this contribution to, perpetuation of, and enhancement

of the school-housing spiral — the placement of subsidized housing virtually exclusively in Southwest Yonkers, the direct impact of this practice on residential and school segregation in the city, and the resulting impact on private housing and school choices, leading to further segregation — for which the city bears substantial responsibility.

B. Budgetary Control

The Yonkers School District is, by virtue of state law, fiscally dependent on the City of Yonkers.[151] Under state law, the Board must prepare each year an itemized budget of its estimated expenditures for the following fiscal year. In Yonkers, this budget is prepared initially by the Superintendent of Schools and his or her staff and consists of a line-by-line itemization of specific expenditures. The bulk of the school district's budget typically consists of expenditures for salaries and employee benefits for instructional staff; building maintenance and utilities; debt service payments for school construction and rehabilitation, and educational program and curricular development expenses.

Once the Board adopts the budget, it is submitted to the City Manager, who is responsible for reviewing budget requests for all City departments. The City Manager reviews the budget on a line-by-line basis in order to determine its overall reasonableness. The budget is then submitted to the City Council's budget committee, at which time a line-by-line review is again performed. The City Council also holds public hearings on the school district's budget request, as with other City department budgets. State law provides that the City Council may increase, diminish or reject any item in the budget other than fixed costs for which the City is liable. Once the City appropriates a specific dollar

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[151] Yonkers is one of five school districts in New York State which is fiscally dependent on the city in which it is located; the others are the New York City, Buffalo, Rochester, and Syracuse school districts. N.Y. Educ. Law § 2576 (McKinney 1981).

amount for the total school district budget, the Board is permitted to spend the allocated funds for any educational purpose. Since the bulk of the school budget consists of fixed costs, or "mandated" expenses, such as personnel costs, reductions in the Board's budget request typically affect educational programs and services. Tr. 5025 (Jacobson).

Apart from the Board's annual budget appropriation, the Board has also utilized the "special estimate" procedure as a means of receiving additional operating funds. The special estimate is a specific request for additional funds from the City to be used for a specific purpose, such as school construction and rehabilitation, specific educational programs such as summer school and adult education, or educational materials and equipment. The special estimate is either approved or disapproved by the City Council, a process which effectively results in a line-by-line review of school district budgetary needs. The procedure is thus an additional means by which City budgetary control over educational affairs may be exercised, a fact which prompted the New York State Education Department to recommend that the use of the procedure be eliminated. GX 45, at 20. While the City Council has in fact used the special estimate procedure in at least one instance to attempt to influence educational policy decisions of the Board, GX 194 (return of special estimate in 1954 based on Board's decisions regarding Schools 1 and 2), the record as a whole reflects consistent City approval of special estimate requests. *E.g.*, GX 177, 348, 349, 404. The special estimate thus represents a means for the City to exercise greater control over school affairs which has in practice been generally uncontroversial.

The Board, like other city departments, also receives appropriations from the City for capital expenditures. Until the mid-1960's, the Board received capital funds by submitting individual special appropriation requests for capital items directly to the Common Council (as the City Council was formerly known). Since 1964, the capital budget process has been significantly

more elaborate. Capital expenditure requests for the Board and all City departments now take the form of five-year Capital Improvement Program budget requests. The Board's capital budgets, which typically include requests for school construction, rehabilitation or expansion and the purchase of equipment, are submitted to the City's Capital Improvement Projects Committee, which collects and reviews capital expenditure requests for all City departments. Pursuant to City law (Local Law 12), the Board's capital budget request is submitted to the City's Planning Board for further examination in light of the City's Master Plan. The Planning Board then makes a budget allocation to the Board, a decision which is reviewable by the City Council.

Although the Board is an independent body under state law, the impact of this budgetary scheme has been to vest in the City considerable influence and indirect control over school affairs. Although former Mayor Alfred Del Bello (1970-74) and former City Manager Charles Curran (1952-63) testified that school budgets were subjected to less scrutiny than budgets of regular municipal departments, the fiscal dependency of the Board has nevertheless been accompanied by an indirect but increasing municipal role in determining how educational decisions are made by school officials. A 1934 Columbia University study team noted that "[i]n actual practice, the placing of responsibility for the school budget in the hands of the [City] operates to center control of the educational program in the general municipal authority." SB 10, at 2. Although state law permits the Board to spend its lump sum budget allocation as it sees fit, the report noted that the contention that the Board thus maintains full control over educational programs "seems scarcely to be justified in the light of the actions taken by the board of education in an attempt to balance its budget." *Id.* at 3. A 1957 New York State Education Department report echoed these findings, noting that although under state law the Board is solely responsible for the educational function in Yonkers, the city, largely because of its fiscal control over the school district, in fact has "two boards of

education operating [its] schools." GX 45, at 17. The report observed that "Yonkers school officers have failed to do all they know needs to be done because of confusion of responsibility and a legal inability to provide the needed money" and recommended that state law be changed to give the Board greater fiscal independence and responsibility over school affairs. *Id.* at 13-14.

The City's budgetary influence over school affairs has continued throughout the 1970's. School officials have repeatedly recognized that the school district's fiscal dependency has in fact resulted in a politicization of educational affairs. For example, the school district's evaluation of the 1972 NYU Report proposals regarding the high schools occupational education programs was affected substantially by what school officials perceived to be the political infeasibility of their implementation. The district's responsiveness to these political concerns contributed to the rejection of the report's variable access proposal in favor of a more costly but more educationally limited reform. In this connection, Assistant Superintendent Stanley Schainker accurately noted that

> I think everyone here probably knows that the Yonkers School Board, in essence, or the school district was fiscally dependent upon the City of Yonkers and decisions made by the city manager, city council, mayor, et cetera, so it wasn't as if, you know, we had the ability to raise our own money that we needed to do what we talked about doing. We, in essence, had to convince another series of people, most of whom were elected by the community, and to the extent that the community resisted the idea, any idea, it seems to me that that would have some impact upon the people who owed election to those same individuals.

Schainker Dep. 42-43. Similarly, Superintendent Alioto recognized generally that

> [O]bviously any major expenditure level would require the consent of the City Council so in putting together, for

> example, the NYU report one would have to consider that we were treating with equity all parts of the City that would touch on all City Council geographic areas because the Council did not have a history of supporting — let me put it another way. They sort of had a policy of jealously guarding. If their pothole wasn't getting fixed, nobody's would and I think that had to be a major consideration in putting together a package for reform or change.

Alioto Dep. 42.

The impact of the Board's fiscal dependency was observable in a number of instances during the 1970's. School officials both expressly and implicitly acknowledged the effect of the City's budgetary control over educational decisionmaking and the gradual attempt by City officials to exercise greater control over school affairs largely by virtue of their economic relationship with the Board. This phenomenon was manifested in a number of ways; for example, Board member Charles Curran's perception that the City Manager was attempting to take over the Board, GX 157; the Mayor's creation of a Citizen's Budget Advisory Committee to supplement the City's own budgetary review process — a committee which engaged in a detailed analysis of the Board's budget requests and a questioning of the Board's educational needs and goals, GX 167, 168; the City budget director's critical assessment of the Board's occupational education budget requests, GX 351; Superintendent Alioto being assigned the responsibiity of improving City/Board cooperation as his sole priority for 1975, GX 128. While this scrutiny of educational funding is not inherently unjustifiable and was generally resisted by school officials, the fact remains that the City's indirect but significant role in shaping the educational programs in Yonkers public schools gave it significant influence over school affairs and in some instances impeded the Board's practical ability to effectuate educational reforms.

The clearest example of the negative impact of the Board's fiscal dependency occurred in 1976 when the City's fiscal crisis resulted in sizable reductions in the school district's budget. The school district bore a significant share of the City's budget cutbacks, with the Board receiving 9.1% less than its annual budget request, a decrease of approximately $6 million. GX 160, 207; Tr. 5161-63 (Morris). The 1976-77 school year was marked by further cuts in the school district's budget amounting to over $9 million as a result of the state's imposition of fiscal restraints on the city. These budget cutbacks had a significant disruptive impact on educational programs in the city, with Southwest Yonkers schools suffering from particularly severe reductions in staff and specialized or remedial educational programs. *See* SCHOOLS IV.A.3.b, IV.B.2 *supra*.

The influence of the City's budgetary power on school affairs was overshadowed by other concerns during the Board's consideration of the Phase II plan. Financial considerations with respect to the City's budgetary influence over school affairs played a relatively insignificant role in the Board's evaluation of the plan; the recommended school closings and primarily state-subsidized transportation would have resulted in net reductions in fiscal expenditures. Thus, to the extent that fiscal matters were at all relevant to Phase II, such concerns related primarily to the relative fiscal merit of the plan and its financial feasibility rather than a concern that the City's budgetary control over the Board would preclude its successful implementation. While City Council members and the Mayor publicly expressed opposition to the plan, the financial considerations noted above effectively minimized the issue of budgetary approval in the Board's consideration of Phase II.

While the City's budgetary influence and indirect control over educational affairs has impeded the Board's ability to exercise its responsibility for operating the Yonkers public schools in a truly independent manner, the record does not demonstrate that

the detrimental impact of the Board's fiscal dependency has been the result of budgetary actions by the City intended to perpetuate the racial segregation of the Yonkers public schools. This conclusion, however, is more a consequence of the Board's own inaction rather than any absence of segregative intent on the part of the City: because of the Board's independent failure to put forth any significant desegregative school reorganization proposal requiring the City's budgetary approval, we are unable to and need not determine whether the City would or would not have acted in a manner consistent with its actions relating to subsidized housing, mayoral appointments, or other areas of school affairs. While the school district's rejection of the 1972 NYU Report was influenced by the perceived infeasibility of obtaining City Council approval, the City was essentially never afforded an opportunity to formally indicate its budgetary approval or disapproval of the plan. Although the effect of the City's 1976 budget cutbacks on the school district, and Southwest Yonkers public schools in particular, was severe, the fiscal considerations underlying this action dispel any argument that racial factors played any role in the City's action. Finally, the City's willingness to fund school desegregation plans — a telling indication of its segregative or desegregative intent (*Arthur* v. *Nyquist, supra,* 573 F.2d at 145) — was not tested by virtue of the Board's refusal to adopt any such plans prior to the filing of this lawsuit.

C. Mayoral Appointment of School Board Members

In addition to the City's budgetary control over the Yonkers School District, the Mayor plays a significant role in educational affairs through the power of appointment. Under the New York State law, the Mayor of Yonkers is empowered to appoint members of the Board for five-year terms of office. Once appointed, Board members are subject to removal only for a refusal to serve or neglect of duties. N.Y. Educ. Law § 2553(3), (8) (McKinney 1981). The Mayor has generally maintained little

personal contact with his appointees subsequent to their appointment to the Board. Tr. 11,729 (O'Keefe); Tr. 13,577 (Lester).

Prior to the terms of Angelo Martinelli, Yonkers' Mayor from 1974-79 and 1982 to the present time, many Board members served more than one term and were frequently reappointed by mayors other than those who initially appointed them to the Board. Over the twenty-five years prior to Mayor Martinelli's terms of office, twenty-two of the Board's thirty-three trustees were reappointed by a successor mayor. SB 486. In contrast, not a single Board member who was serving at the time of Martinelli's 1973 election as Mayor was reappointed. *Id.*

Mayor Martinelli's election to office was followed by increased efforts to obtain greater influence over educational matters. The Mayor's initial efforts took a number of forms. Soon after his election, Mayor Martinelli spoke to Superintendent Alioto and the Board in executive session and indicated his interest in obtaining influence over Board personnel decisions relating to the hiring of non-teaching staff such as custodians and groundskeepers. Mayor Martinelli's request provoked strong protests from school officials and Board members. Mayor Martinelli responded by emphasizing his power over Board appointments and his intention to exercise it in a manner which would make the Board more responsive to his educational goals. Tr. 5028-29 (Jacobson); Alioto Dep. 27-29; Jungherr Dep. 7-9.

The Mayor also sought to influence matters relating to student assignments. In April 1974, the Mayor requested that students from a small predominantly white area of the School 3 (60% minority) attendance zone be reassigned to School 27 (12% minority). Donald Batista, the school district's Assistant Director of Pupil Personnel, recommended that the request be rejected, noting that the impact on student enrollment was negligible and that "[t]here is potential for a greater community reaction since it appears that the district line is being gerrymandered." SB 206. As a result, the district line remained unchanged. Tr. 13,433-36

(Frank). During his tenure as Mayor, Martinelli also urged the Board to convert the school system into a K-8, 9-12 grade structure, thus returning sixth, seventh and eighth grade students to elementary schools. This proposal was rejected by the Board. Tr. 5089 (Jacobson).

In March 1974, the Mayor made his first Board appointment, naming Angelo Paradiso to the Board. Paradiso, the principal of Saunders Trades and Technical High School from 1964 to 1973, had resigned his post in 1973 after a dispute with Superintendent Alioto concerning the Saunders screening process and Paradiso's unwillingness to address the problem of the disproportionately low number of minorities at the school. Paradiso was a strong advocate of the self-contained vocational school, rather than the comprehensive high school concept, an educational philosophy shared by Mayor Martinelli but which was slowly coming under increased scrutiny by school officials. GX 1018; Tr. 7676 (Martinelli). Later that year, Mayor Martinelli appointed Paradiso to the City's Saunders site selection committee, a committee established independently of the Board's committee to examine alternatives for the relocation of the school. GX 660.

Mayor Martinelli's second appointment was Curtis Giddings. Giddings, who is black, was chosen to replace Wiley Hammond, a retired school administrator, who was also black. Prior to his appointment, Giddings was a teacher, guidance counselor, and administrator in the New York City public school system. C-1424.

Mayor Martinelli's 1975 Board appointments were significantly more controversial. On May 1, 1975, the Mayor appointed Anne Bocik and Morton Wekstein to the Board. GX 251. Like Paradiso, Bocik, a former Yonkers public school teacher and elementary school principal (Schools 18 and 24), had retired one year earlier under pressure from Superintendent Alioto's administration. According to Assistant Superintendent Stanley Schainker, Bocik's retirement was prompted by unfavorable job

evaluations based on her performance as principal of School 18. This evaluation was based on her ineffectiveness in planning as well as her use of racial slurs and other racially insensitive behavior toward minority students. Bocik's treatment of minority students in this manner was recalled by several administrators and school teachers in the district. Tr. 4377 (Barrier); Tr. 5530-36 (Davis); Schainker Dep. 64-67; Gold-Marks Dep. 59-60, 104. Soon after her retirement from the district, State Senator John Flynn wrote to Mayor Martinelli, recommending that Bocik be appointed to the Board based on her educational experience and her ethnic (Slavic) background. C-1405. Former City Councilman Nicholas Benyo, leader of Yonker's United Slavonian American League, also urged her appointment based on her ethnic background. Tr. 7669-70, 12,369 (Martinelli). Prior to her appointment, Board president George Minervini advised Mayor Martinelli not to appoint Bosik to the Board. Although Mayor Martinelli knew of Bosik's retirement from the school district, Martinelli testified that Minervini gave no explanation for his advice and that Martinelli did not request any. Tr. 7667-70.

Morton Wekstein was Mayor Martinelli's personal attorney. At the time of his appointment to the Board, Wekstein's law partner was representing a number of school administrators who had been considered ineffective by Superintendent Alioto.

The appointment of Bocik and Wekstein to the Board was met with widespread protests and denunciations from various segments of the community. Representatives of the minority community publicly criticized the Bocik appointment based on her racially discriminatory behavior and filed a complaint with the New York State Education Department regarding the appointment. GX 226, at 46,049; Tr. 3554 Ross). Wekstein's appointment was questioned because of his alleged conflict of interest. GX 226, at 46,048; 251. In a press release, Superintendent Alioto stated that in selecting "an ex-principal who was requested by me to retire early" and an attorney from a firm which represented the

Mayor himself as well as school district employees with grievances against the district, Mayor Martinelli was attempting to make "good his pledge to take over the Board of Education in retaliation for my persistent refusal to provide him with Board of Education jobs on which to build his political career." GX 136. Board president Robert Jacobson similarly decried the "definitely political nature" of the appointments. GX 136,224. Upon being personally confronted about the Bocik appointment in particular, Mayor Martinelli defended his decision based on her ethnic background. Gold-Marks Dep. 63-65; *see also* Tr. 3554-55 (Ross). While Bocik served her full five-year term, Wekstein resigned less than one year later based on his anticipated legal representation of Mayor Martinelli's brother, a long-standing client and owner of the Yonkers Home News and Times, in a lawsuit involving the City Council's designation of an official newspaper. C-1408.

Two significant school-related events occurred between the Mayor's 1975 and 1976 appointments to the Board. First, in response to the concerns expressed by the Yonkers NAACP over the increasing racial imbalance in Yonkers public schools, the Board, led by Board president George Minervini, established the Task Force for Quality Education. Minervini appointed Winston Ross and Herman Keith of the Yonkers NAACP to serve as members of the ten-member Task Force. Second, the Board adopted a controversial and strongly opposed plan to close seven schools in order to comply with budget cutbacks imposed by the City as a result of its fiscal crisis. Along with most of the East Yonkers community, Mayor Martinelli actively opposed the closing of Schools 4 and 15 in East Yonkers and participated in vigorous efforts to reverse the decision. *See* SCHOOLS IV.A.3.b *supra*.

By this time, Mayor Martinelli's efforts to gain control over educational affairs through his Board appointments were increasingly recognized by Board members and school administrators

alike. Retiring Assistant Superintendent Stanley Schainker noted that he was "deeply concerned about the increasing efforts of some to politicize the schools for their own personal aggrandizement" and stated his belief that "those efforts already have had a negative impact upon the operations of the Board of Education." GX 130. Other school officials similarly indicated that Mayor Martinelli had expressed his intent to exercise his appointment power in a manner which would give him control over the Board. Alioto Dep. 29; Tr. 11,083-85 (Jacobson); GX 224.

In the aftermath of Wekstein's resignation, Winston Ross wrote to Mayor Martinelli, requesting that he consider appointing a hispanic to the Board. GX 241. Mayor Martinelli responded by emphasizing that his appointment would be "based on the quality of the individual irregardless of racial background", GX 242, a position somewhat inconsistent with his recent ethnically-motivated appointment of Ann Bocik and his subsequent appointment of John Romano to the Board. In April 1976, Mayor Martinelli appointed James O'Keefe to the Board. O'Keefe, a realtor from Northeast Yonkers, was strongly opposed to the closing of School 15 and led the Taxpayers of North East Yonkers organization in their public opposition to the school closing. Upon being appointed to the Board, O'Keefe, like Martinelli, continued to press for a reversal of the Board's decision to close the school. GX 187; SB 867.

As in 1975, the Mayor's 1976 Board appointments were controversial. In May 1976, the terms of George Minervini and Rosemarie Siragusa were scheduled to expire. One month earlier, Minervini, who had been instrumental in establishing the Task Force for Quality Education, appointed Siragusa to the Task Force. GX 931. Both Minervini and Siragusa were generally regarded as two of the Board's strongest advocates of school desegregation in Yonkers. Siragusa, like Minervini, also had voted to close Schools 4 and 15, and had declined to accept the Mayor's invitation to participate in a "walk" in protest of School 15's

proposed closing. GX 134, 255. The Council of PTA's recommended their reappointment, with Council of PTA's officer Audrey Roshkind recalling the "tremendous job" which Minervini had done as a Board member. Roshkind Dep. 140; Tr. 5296-97 (Frauenfelder). The Yonkers NAACP also recommended that both trustees be reappointed to the Board. Tr. 3634-35 (Ross). Superintendent Robitaille, who had replaced Superintendent Alioto in December 1975, took the unusual step of personally recommending that the Mayor reappoint Dr. Minervini so that Minervini, the Board president who Robitaille described as an "exceptional individual," could lead the district "in a very difficult time." Tr. 4657-58. This recommendation was echoed by the endorsement of the Clergy of Yonkers as well. Tr. 4530 (Klausner proffer). Both Minervini and Siragusa expressed to Mayor Martinelli their interest in continuing to serve as Board members.

Mayor Martinelli reappointed neither Minervini nor Siragusa to the Board. Although Mayor Martinelli testified that his decision to replace Dr. Minervini, a friend of the Mayor's, was ultimately made because of his membership on the Board which had previously agreed to add a job security clause to the teachers' contract, Tr. 12,372, Martinelli, in earlier testimony, expressed doubts that this factor influenced his decision. Tr. 7672-73. Mayor Martinelli's refusal to even consider reappointing Siragusa was based not only on their disagreement on educational matters but also on her participation in political campaigns in which she opposed Martinelli's election as Mayor. Tr. 12,373-74 (Martinelli). While Mayor Martinelli denied that Minervini and Siragusa's position on busing was a factor in his decision not to reappoint them to the Board, Martinelli also acknowledged that by the time of the Phase II proposal the following year, he routinely asked Board candidates about their position on busing and that their response "probably weighed very heavily with me." Tr. 12,411-12. Given the increased community awareness of school desegregation as an issue which the Board and school administrators were beginning to address, the identification of the

Task Force's efforts by some community members as supportive of "busing," the Mayor's own acknowledgement that busing became an issue of considerable importance in his appointment process, and the Mayor's subsequent appointments to the Board, we have difficulty concluding that Mayor Martinelli's refusal to reappoint either Minervini or Siragusa was not influenced by their generally well-known commitment to addressing the problem of racial imbalance in the Yonkers public schools and thus their potential willingness to utilize busing as a method of doing so.

To replace Minervini and Siragusa, Mayor Martinelli appointed Joseph Spencer and John Romano to the Board. Spencer was a member (and later Chairman) of the Yonkers Conservative Party who supported the Mayor in his previous election campaigns but who had no prior particular involvement in educational matters. Spencer Dep. 21-23; Tr. 7674-75 (Martinelli). Romano, an attorney, was supported by the Congress of Italian-American Organizations and had helped pass state legislation enabling the City to use air rights for educational purposes, a technique which Mayor Martinelli had proposed in 1974 with respect to the Saunders Trades and Technical High School. Tr. 7676, 12,373 (Martinelli). Soon after their appointment to the Board, Spencer and Romano voted against applying for state funding of the Board's Task Force for Quality Education. P-I 59-24.

Mayor Martinelli's next Board appointment was made earlier than scheduled. The Board's decision to close Schools 4 and 15 was followed by vigorous efforts to overturn the decision. In addition to instituting legal proceedings and engaging in various forms of public protest, the East Yonkers community also participated in two particular courses of action. First, members of the Board were subjected to repeated harassment and verbal abuse, with several trustees experiencing picketing of their businesses or homes. In September 1976, Board member Ian (Doug) Smith, a target of this harassment, resigned from the Board. In his letter of resignation to Mayor Martinelli, Smith urged the Mayor to

appoint an independent-minded trustee in order to ensure a balance in educational philosophies on the Board; in a letter appearing in the Hearld Statesman, Smith also bemoaned the "political machinations behind this personal harassment" which led to his resignation. GX 162, 200. Smith's resignation was greeted with regret by community members and expressions of concern that the Mayor would respond by appointing a replacement who would enable him to gain control of the Board. GX 163, 261. At a Board meeting held immediately after Smith's resignation, Mayor Martinelli urged the Board to table a resolution calling for the return of the recently closed schools to the City. The Board, with non-Martinelli appointees Jacobson and Katherine Carsky dissenting, tabled the resolution. GX 187.

During the fall of 1976, the Northeast Yonkers community also established an alternative private school in response to the closing of School 15, action which prompted a lawsuit by the Board. One individual actively involved in opposing the School 15 closing and establishing the alternative school was Seelig Lester. Lester, an experienced educator who served previously as deputy superintendent of the New York City public schools, was a strong advocate not only of reopening School 15 but also of the self-contained vocational school — two positions known and shared by Mayor Martinelli. Tr. 7670-71, 12,406-07 (Martinelli); Lester Dep. 16-18. In November 1976, Dr. Lester was appointed to the Board. GX 262. In May 1978, during the Board's consideration of Phase II, Lester became the first Board member to be reappointed by Mayor Martinelli.

Mayor Martinelli's 1977 appointment to the Board, Dorothy DeRuve, was uncontroversial yet consistent with the nature of his prior and subsequent Board appointments. In May, Katherine Carsky's term as a Board member expired. Carsky, who had voted to close Schools 4 and 15 and opposed the delay in returning the schools to the City, had expressed to Mayor Martinelli her interest in continuing to serve on the Board. GX 205. Carsky was

also supportive of the desegregative efforts of the Task Force for Quality Education. Tr. 3583-84 (Ross); *see also* Tr. 4663 (Robitaille). Mayor Martinelli instead appointed Dorothy DeRuve, a dental assistant from Northwest Yonkers, to the Board. Although the record fails to disclose whether Mayor Martinelli specifically inquired about DeRuve's position on busing, DeRuve opposed Phase II primarily because of the "assigned transportation" element of the plan. SB 815, at 6-9. In light of the Mayor's reliance on opposition to busing as a significant criterion in making his later Board appointments and the simultaneous and well-publicized efforts of the school district in the spring and summer of 1977 to formulate proposals for desegregating the schools, it is reasonable to infer that these considerations played some role in the Mayor's 1977 Board appointment.

In April 1978, just after the public hearings on Phase II, Curtis Giddings, the Board's only black member, resigned from the Board after moving out of Yonkers. Yonkers NAACP President Winston Ross wrote to Mayor Martinelli, requesting the he appoint a black to replace Giddings. Ross specifically recommended former Yonkers NAACP President Herman Keith based on his "sincere enthusiastic interest" in the welfare of minority students. GX 238. Mayor Martinelli flatly rejected this recommendation based on Keith's previously expressed opposition to the Mayor's policies, and urged Ross to submit recommendations for persons "who at the very least have taken a neutral position with regards to the policies and programs which I espouse." GX 239. At the same time, Vice Mayor Arthur Freddolino introduced three resolutions in the City Council requesting that Mayor Martinelli not appoint new Board members until their position on busing was made public and that the Board not vote on Phase II until the Board's three new appointees were named by the Mayor. GX 143. Mayor Martinelli also had expressed his own opposition to the Phase II plan, opposition not only based on his firm stance against "forced busing" but also reflecting his belief that only three of the district's twenty-five elementary schools and one of

the district's seven middle schools were racially isolated. Tr. 7650-54 (Martinelli). *Cf.* GX 64; SCHOOLS IV.A.3.b *supra.*

Mayor Martinelli's three Board appointments in April and May of 1978 were consistent with these criteria and his own personal opposition to Phase II. In April, Mayor Martinelli appointed Quentin Hicks, who is black, to replace Curtis Giddings. Hicks, a Republican Party district leader, had been active in the past in the Warburton Ashburton Ravine Project Area Committee (a group which advocated the use of scattered site housing in Yonkers) and had become known to Mayor Martinelli through their contemporaneous service on the committee. Tr. 7665-66 (Martinelli); Hicks Dep. 37. The Hicks appointment, however, was immediately protested by members of the black community who believed that Hicks was not representative of their interests. Tr. 3647-51 (Ross); Tr. 8373 (Keith). Although Mayor Martinelli denied knowledge of Hicks' educational philosophy, Hicks' opposition to busing was consistent with the selection criteria used by Mayor Martinelli at the time and was publicly articulated by Hicks at the time of his appointment to the Board. Hicks Dep. 49. As became clear the following month, Hicks' opposition to Phase II was based not only on opposition to busing but also on his conclusion that both white and black community members were opposed to racial integration of the public schools. *See* SCHOOLS IV.F.3 *supra.* One year later, Hicks was reappointed to the Board by Mayor Martinelli. In 1981, Mayor Martinelli acknowledged to Herman Keith that his appointment of Hicks to the Board had been an embarrassment to the black community. Tr. 7665-66 (Martinelli); Tr. 8374-75 (Keith).

In May 1978, Mayor Martinelli made two appointments to the Board. First, the Mayor reappointed Seelig Lester to the Board, an appointment which was consistent with his past qualifications as well as his opposition to the Phase II plan. Second, Mayor Martinelli chose Robert Weiner to fill the seat vacated by

Robert Jacobson. By that time, Jacobson, an active Board member who was generally supportive of the Phase II plan, had concluded that Mayor Martinelli's decision to replace Board members Minervini and Siragusa had effectively thwarted any possibility that Phase II would be adopted by the Board. Tr. 11,139 (Jacbson). Although Jacobson did not discuss with Mayor Martinelli the possibility of being reappointed to the Board, Jacobson had already concluded that his reappointment was unlikely and that he probably would not have continued to serve in any event. Tr. 4963, 11,135, 11,146. Weiner, Mayor Martinelli's former campaign manager, had asked the Mayor a number of times to consider appointing him to the Board. Weiner Dep. 54-56. Weiner, a known opponent of busing, was selected by Mayor Martinelli based on their mutual opposition to the Phase II plan. Tr. 7677 (Martinelli); Weiner Dep. 86. In May 1978, the Board, now comprised solely of Mayor Martinelli's appointees, held a special workshop meeting at which Board members expressed their unanimous opposition to Phase II. *See* SCHOOLS IV.F.3 *supra*.

The Mayor's final two appointments were relatively uncontroversial but not devoid of overtly political design. After appointing Joseph Sayegh, a doctor of medical research who had worked since 1962 on the Mayor's Community Relations Committee, the Mayor, in the midst of a re-election campaign in which the Board appointment process was a frequently debated issue, appointed Arthur Natella to the Board. Natella, a retired Yonkers school principal from Southeast Yonkers, was appointed by Mayor Martinelli on the day of a mayoral debate in Natella's home community in an effort to deflate the criticism of the Mayor's previous Board appointments and to garner the support of the community. Subsequent to his electoral defeat in November 1979, the Mayor issued his State of the City address. In addition to commending the quality of the school district's new Superintendent and Board trustees, Mayor Martinelli emphasized that "we now have a Board of Education fully committed to

neighborhood schools which is of critical importance to neighborhood stability in this city!" GX 848b.

After the City's new mayor, Gerald Loehr, took office, the Board appointment process was changed. Since 1980, candidates for Board appointment have been recommended by a blue ribbon panel consisting of twelve to fifteen members appointed by the mayor. The panel chooses a small number of qualified candidates and submits their selections to the mayor. By the time this lawsuit was commenced in December 1980, the Board had failed to develop and implement any desegregative portion of or alternative to the Phase II plan and continued to retain the previously closed and unused School 4 facility. Mayor Martinelli, re-elected in 1981, has reappointed all Board members whose terms have expired since that time and thus has not reappointed any new members to the Board.

The Mayor's appointments to the Board reflect in clear and unambiguous terms the politicization of educational affairs in Yonkers. The record demonstrates that Mayor Martinelli's Board appointment power was utilized in a manner which would enable him to obtain indirect but significant influence over school affairs, influence which he had been initially unsuccessful in obtaining more directly. While Board members were generally free of outside influence from the Mayor subsequent to their appointment, the conduct of Board members was generally consistent with the Mayor's intentions and objectives in appointing them to the Board. Even when his earlier appointees (*i.e.*, Paradiso and Bocik) occasionally disagreed with his positions, such as the 1976 proposal to close seven schools which Mayor Martinelli adamantly opposed, the subsequent conduct of these trustees (in voting to delay returning the closed schools to the City and in opposing Phase II) and of Mayor Martinelli's subsequent appointments to the Board was indicative of the Mayor's successful exertion of considerable influence over educational affairs in Yonkers.

Mayor Martinelli's appointments to the Board went beyond the mere exercise of ordinary political discretion. Beginning in 1976, mayoral Board appointments also became more directly related to Board members' views on matters concerning school desegregation. While the isolated appointment of a busing opponent or the single, unwitting appointment of a trustee with less than admirable views concerning minorities or school desegregation is perhaps an insufficient basis for inferring impermissibly discriminatory intent, *see Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 959 (Mayor's appointment of single trustee based on trustee's opposition to busing insufficient evidence of discriminatory intent), this is not such a case. Here there is a pattern of appointments, reappointments, and failures to appoint over time, with the consistent result of impeding the efforts of the school district to address the racial imbalance of the schools. In addition, the appointment of Board members must be viewed not in isolation but in conjunction with other contemporaneous occurrences in the city. The increasing efforts to establish a Board firmly committed to neighborhood schools dovetailed neatly with the City's most concentrated development of family-populated subsidized housing projects in Southwest Yonkers at or about the beginning of Mayor Martinelli's first term, and the subsequent resistance to the development of subsidized housing in East Yonkers during the remainder of Mayor Martinelli's terms in office. The two patterns were of a piece: the City's segregative housing practices and the Mayor's appointment of individuals opposed to "busing" contributed significantly to the confinement of minorities in Southwest Yonkers and the Board's failure to undo the segregative effects of these and other practices on the schools. And in a city where the segregated condition of "neighborhood schools" is in part the product of official municipal design, the commitment to the neighborhood school system by the head of that same municipality can hardly be considered race-neutral. *Cf. Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 968-69 (school board's adherence

to neighborhood school policy not race-neutral where city officials have engaged in segregative public housing practices).

D. School Site Selection

The City has also played a significant role in the selection of sites for new schools. This participation originates from the City's legal responsibility for appropriating funds for the acquisition of land and the construction of school facilities. The Board initiates the site selection process by deciding whether to build a new school and where it wants the school to be built. The City's Planning Bureau assists in the site selection process by analyzing demographic patterns and making land use recommendations. Once the Board selects a particular site, it must submit its request to the City Council, which has final authority to approve or reject the site. The City retains legal title to land acquired by the City Council and designated for educational use. However, once the land is so designated, the City has no legal power to dispose of the property until the Board votes to return the school to the City. N.Y.Educ. Law § 2556 (9) (McKinney 1981); Tr. 8922 (Curran).

In actual practice, the City's involvement in school site selection decisions has been considerable. While only three site selection decisions have been made since 1967 — School 10, Yonkers High School, and the new Saunders Trades and Technical High School — City officials played a central role in each of them. The extent of the City's involvement, its impact on the site selection and school construction process, and its effect on racial imbalance will be examined for each of these schools.

1. Yonkers High School

Yonkers High School has served as the district's high school for Southwest Yonkers students since its inception in 1927. The school also enrolled students from Southeast Yonkers until 1957, when the Lincoln facility in Southeast Yonkers took on a high school component. In 1944, Yonkers High School was relocated

to the former Franklin Junior High School facility on Linden Street in Southwest Yonkers, and Franklin students were relocated to the former School 2 elementary school facility just two blocks away. Although the relocations were originally implemented as temporary war-time measures, the schools remained in their respective locations for the next three decades.

Over the years, these two facilities were increasingly recognized by school officials and community members as physically inadequate for their respective student bodies. By the mid-1960's, school officials actively began to consider the selection of a site for the construction of a new Yonkers High School. The Board investigated eleven potential sites, with major consideration given to the Leake and Watts property, the Sutherland-Pelton Park site, the Sullivan Oval, and War Memorial Park. In December 1967, the Board requested that the City acquire land located at Sullivan Oval for the construction of the school. The Sullivan Oval site, located in a predominantly white residential section of Southwest Yonkers, consisted of park land and recreational facilities. The site was selected based on an examination of eight factors: location, area, topography, procurement, acquisition costs, development costs, community, and safety and access. Sullivan Oval's larger site size, lower acquisition and development costs, and the absence of any relocation burdens on community members were the primary factors underlying the Board's recommendation. P-I 46-53.

The Board's selection of the Sullivan Oval site provoked immediate and widespread controversy in the community. A large number of community organizations and city residents and the Westchester County Department of Parks, Recreation and Conservation opposed the selection of the Sullivan Oval site primarily because of its alleged impact on the availability of already scarce park space for recreational use by community members. The Parks Department and several City Council members suggested War Memorial Park as an alternative site, while other community

members suggested the Sutherland-Pelton site. GX 278; P-I 46-38, 46-40. War Memorial Park is located just northeast of Getty Square in the heart of Southwest Yonkers, and the Sutherland-Pelton site is located on McLean Avenue in the southernmost portion of Southwest Yonkers. Both areas contained greater concentrations of minority residents than the Sullivan Oval site. Tr. 5183, 5253 (Morris); SB 742.3. On the other hand, the PTA's of Southwest Yonkers' Schools 3, 18 and 27, Longfellow Junior High School and Yonkers High School urged City Manager Frederick Adler to support the acquisition of the Sullivan Oval site based primarily on the already protracted use of what community members and school officials recognized was a physically confining and inadequate school facility, as well as the continued use of the former School 2 facility for Franklin Junior High School students. GX 278.6, 278.7, 278.8, 278.10, 278.13. In the spring of 1968, the City Council rejected the Sullivan Oval site. Tr. 5185 (Morris); P-I 46-60, 46-63.

The remainder of the year and the next was filled with continued controversy surrounding the site selection for the new Yonkers High School. Community members and school and City officials continued to debate the site selection issue along the lines noted above, with a general division of opinion along "recreational use" versus "educational use" lines. P-I 46-75, 46-85, 46-87. The Board was also asked by Southwest Yonkers residents, PTA members and the Yonkers High School Redevelopment Committee to redistrict the city's high schools so as to provide for a more equitable distribution of "physical facilities and educational opportunities." GX 493, 494. The Board did not implement this suggestion but continued to adhere to its selection of Sullivan Oval as the site for the new Yonkers High School. Finally, in 1970 the City Council reversed its position and approved the construction of the new Yonkers High School on the Sullivan Oval site. Tr. 1255, 1408-09 (Del Bello); GX 1093.8, 1094.20. Construction of the new school commenced thereafter and the school opened in February 1974, with Franklin Junior High

School students relocated to the old Yonkers High School facility the following year.

While the assignment of Southwest Yonkers high school students to the inferior Linden Street facility was an unfortunate circumstance, the record is devoid of evidence which demonstrates either that the City's role in selecting a new site for Yonkers High School is evidence of its control over the Board or that the City's or Board's role in selecting the site was at all affected by racial considerations. While the 1968-69 delay in selecting a site for the school was the result of the City Council's rejection of the Sullivan Oval site, this delay was influenced by non-frivolous concerns unrelated to racial or even educational factors. In addition, the Board adhered to its original site selection despite strong opposition to its decision and the City's initial rejection of the Sullivan Oval site. The site was eventually approved by the City and was the most predominantly white of the three sites under active consideration by the Board. While Yonkers High School is presently racially imbalanced (62% minority) as compared to the district's other high schools (47%, 2%, and 9% minority), we find that this condition was not deliberately caused by the conduct of the City or the Board in selecting the site for the new school.

2. Saunders Trades and Technical High School

Until 1980 the Saunders Trades and Technical High School, the district's vocational school, was located in the Getty Square area in downtown Southwest Yonkers. The school was significantly smaller than the district's other high schools and had long been recognized as a physically inadequate facility. GX 43, at 31-32 (1957 New York State Education Department study recommending replacement of Saunders facility). As the school's reputation improved during the late 1960's and early 1970's, attention turned to either rehabilitating and expanding the Saunders facility or finding a new location for the school. In 1973, the school district rejected the NYU Report proposal to close the school and

decentralize its programs throughout the district's regular high schools. The Board instead adopted a plan to rehabilitate and expand Saunders and to augment its occupational course offerings. *See* SCHOOLS IV.F.2 *supra.*

In the spring of 1974, a Board study concluded that the cost of constructing a new facility was not substantially greater than the cost of rehabilitating and expanding the existing Saunders facility. C-1403. As a result, school and City officials began to investigate the possibility of either rehabilitating Saunders or constructing a new facility. P-I 45-53, 45-55, 45-56, 45-71, 45-72. The City retained a consulting firm to perform a study, to be completed by September 1, of the possible construction of a new facility. P-I 45-72. In October, after the Board requested that the City expedite the completion of the study, the City established its own committee to investigate the various alternative courses of action with respect to Saunders. P-I 45-72, 45-73; Jungherr Dep. 28-30. In January 1975, Mayor Martinelli also suggested the formation of a joint committee, composed of City and school officials, to pursue the Saunders investigation. GX 155; C-1403; Tr. 12,364-66 (Martinelli). The Board instead formed its own committee, with school officials also meeting with the City's committee to discuss possible locations for a new Saunders facility. P-I 45-79; Jungherr Dep. 32-35.

From the outset, City officials, led by Mayor Martinelli, were in favor of building a new Saunders on the existing site. At the time, the City was developing plans to build a new civic center in an area partly occupied by Saunders. Mayor Martinelli advocated the construction of the civic center over the new Saunders facility, a plan which would allow the City to build the school at a greatly reduced cost by selling the air rights over the school, as provided for under state law, to the developers of the civic center. In January 1975, the CDA also recommended the construction of the new Saunders on its existing site based on a variety of

economic and space-related considerations. GX 660, at 49,083-86.

At the same time, the Board conducted its own investigation into possible locations for a new Saunders. In a series of meetings held in early 1975, the Board's committee discussed a number of sites, eventually narrowing the selection to the Cook Field site in New York City, War Memorial Field in Southwest Yonkers, and Pelton Field, also in Southwest Yonkers. *Id.* at 49,080. The existing site was considered inappropriate because of site size limitations, but the committee recognized the importance of considering the use of air rights to finance construction of the school. *Id.* at 49,080, 49,082, 49,087, 49,089-90. By March 1975, the committee was considering the War Memorial site and a site at Yonkers and Midland Avenues in Southeast Yonkers. *Id.* at 49,071. (The committee briefly considered the Burroughs Middle School as well. *Id.* at 49,071, 49,073.) At a March 31 joint meeting of the City and Board committees, Mayor Martinelli spoke in favor of the War Memorial Park site and the existing site. *Id.* at 49,068. One day later, the Board's committee recommended the acquisition of the Yonkers Avenue site. P-I 45-107.

The Board's recommendation was adamantly opposed by the City. Mayor Martinelli and Alphons Yost, acting director of the CDA, spoke with schools officials and strongly urged them to consider selecting a site in downtown Southwest Yonkers. School officials continued to believe that the Yonkers Avenue site was the best location for the new Saunders. However, school officials were also cognizant of the mayor's position and the realization that City approval was necessary to obtain a site for the construction of a new Saunders facility. As a result, the Board reconsidered its earlier decision and recommended that the new school be built on the existing site. Jungherr Dep. 55-59; Alioto Dep. 84-86.

The construction of the new Saunders never materialized. The city's 1975 fiscal crisis necessitated drastic reductions in the school district's budget and effectively terminated the district's

plans either to build a new Saunders or to renovate the existing facility. GX 126, at 5. By late 1976, after the district's school closings and other budgetary cutbacks, "rumors" began circulating concerning the possible relocation of Saunders to the Burroughs Middle School facility in Central Yonkers. P-I 75-25, at 39,251. By the spring of 1977, studies were conducted regarding the feasibility of such a relocation, and in June 1977 the Advisory Council for Occupational Education recommended that the Saunders school be relocated to Burroughs. P-I 75-27, at 42,995-96. This recommendation became part of the administration's 1977 Phase II plan, was fairly widely supported by community members, and was adopted by the Board in April 1978. *See* SCHOOLS IV.F.3 *supra*.

While evidence concerning the Saunders site selection process illustrates the City's influence over school site selection, the City's predominance in the site selection process was limited in its ultimate impact. To be sure, the Board's acquiescence in the City's site preference is evidence of its recognition that its fiscal dependence on the City had to be considered in making decisions as to the location of Saunders. As with the new Yonkers High School, however, the Board ultimately selected and obtained, after some delay, a site other than that which was initially recommended by the City and chose a site based on a variety of factors, none of which related in any measurable way to race. The new Yonkers High School was located in the most predominantly white location under active consideration, and Saunders was relocated to the new, physically superior Burroughs facility in Central Yonkers. Although the Board's selection of the Burroughs site was prompted largely by financial constraints which essentially precluded the City-supported construction of a new facility on the existing site, GX 98, at 16-17, the Saunders site selection process eventually resulted in a practical solution which was widely supported by community members, school administrators and the Board. The selection of a new site for Saunders was also largely devoid of racial considerations of either a desegrega-

tive or a segregative nature. In sum, the Saunders site selection is illustrative not only of the City's effective control over this aspect of school affairs but also of the absence of racial considerations throughout the Saunders site selection process.

E. Other City Involvement In School Affairs

The City's involvement in school district affairs has been manifested in a number or other ways. Three particular forms of involvement are discussed below.

1. Attendance Zone Changes

On a number of occasions, City officials have proposed alterations in school attendance zone boundaries. While earlier proposals were relatively free of racial significance, a number of proposed changes during the 1970's were consistent in their potentially segregative impact on the district's schools.

A number of City Council resolutions during the late 1960's to mid-1970's dealt with the redrawing of school attendance zone boundaries. *E.g.*, GX 363, 389, 395. For example, in 1969 Councilmember Del Bello introduced a City Council resolution requesting that the Board consider altering a junior high school boundary line so as to reassign students in the northeast corner of the virtually all-white Burroughs (5% minority) zone to virually all-white Whitman (2% minority). The resolution also requested the City Manager to examine the feasibility of contracting for bus transportation for the affected students if a change in district lines was not possible. GX 363. The resolution was referred to the Superintendent and Board, and the district line remained unchanged. GX 364.

In April 1974, Mayor Martinelli requested that a small predominantly white area of the School 3 (60% minority) attendance zone be reassigned to School 27 (12% minority). Donald Batista, the district's Assistant Director of Pupil Personnel, recommended that the request be rejected, noting that the impact on

student enrollment was negligible and that "[t]here is potential for a greater community reaction since it appears that the district line is being gerrymandered." GX 131, SB 206. As a resut, the district line remained unchanged. GX 364.

In August 1974, Councilmember Walsh requested that the school district rezone the predominantly white dogleg portion of the School 9 (28% minority) zone into School 16's (3% minority) attendance area. According to an analysis prepared at the time by Jerry Frank, the school district's court liaison, the reason for the change was to enable parents in the area "to avoid School 9." SB 214. The analysis noted that the proposed change, which involved thirty-seven students, would not affect the "social mix" at School 16 but would decrease School 9's white student population. *Id.*; Tr. 13,433-36 (Frank). This proposal was not adopted by the district.

During the district's implementation of the 1976 school closings, Alphons Yost, the Director of the City's Department of Development, suggested that the district alter the boundary separating School 9 (30% minority) and 16 (1% minority) so as to include the dogleg portion of the School 9 zone in School 16's attendance zone. This proposal, involving from eighty-three to 122 students, was prompted by a landlord's difficulty in renting apartments in that area because of racial composition of School 9. GX 144, 383; Tr. 2885-89, 3100-05 (Arcaro); Tr. 10,371 (Yost).[152] This proposal was not adopted by the district.

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[152]Evidence concerning this proposal illustrates clearly the City's awareness of the impact of a school's racial composition on residential housing choices. In a memo describing a meeting with Superintendent Robitaille, the City's Department of Development Administrator Alphons Yost stated that

> Discussion centered on the North Broadway area of Yonkers and the perception which residents have of Schools 6, 9, 12, 16, 25, and King. Contact with residents in the area indicates that this perception is greatly influenced by the racial composition of the school. Residents use this perception in choosing whether to live within a school district. Of the six

(Footnote 152 continued on next page)

Although the Board's consistent refusal to implement City-proposed attendance zone changes obviated their potential segregative impact on the schools, the evidence of such proposals is nevertheless illuminating insofar as the City is concerned. These proposals demonstrate the City's awareness of the interrelationship between residential housing choices and the racial imbalance of the schools, a correlation which we have discussed previously in our findings. *See* SCHOOL V.A. *supra*. More important, the efforts of various City officials to accomodate the segregative impact of this interrelationship is additional evidence of the City's segregative intent with respect to public schools as well as subsidized housing.

2. City Council Resolutions

City officials have also used the procedure of passing non-binding City Council resolutions to express their opinion regarding educational matters. Over the years, these resolutions have addressed a variety of school-related issues, such as the addition, site selection, construction, opening, closing, and redistricting of schools, the need to arrange bus transportation for students in particular areas, and the timing of Board decisionmaking. *E.g.*, GX 141, 266, 359, 360, 362, 369, 379, 389, 390, 391, 395, 398, 425, 974.

The impact which such resolutions have had on school affairs has been relatively modest. The nature of the school district's response to City Council resolutions has depended on whether the resolution at issue is perceived to be the expression of serious and geniune concern regarding a particular educational matter or merely political "posturing" by the City Council or the resolu-

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(Footnote 152 continued from previous page)

districts discussed, residents have stated that P.S. 16 [2% minority] has the best reputation.

GX 144. When asked if any City officials at the meeting questioned this phenomenon, Gregory Arcaro, the Planning Department's Senior Planner, stated that "there was no disputing of that as an operative dynamic in the housing market." Tr. 2888.

tion's sponsor. Tr. 1267 (Del Bello). A number of City Council resolutions, such as ones expressing opposition to the closing of School 31 and requesting the Task Force for Quality Education to delay the issuance of its report, were followed by Board actions consistent with the City Council's desires, GX 141; Tr. 1263-64 (Del Bello), and a 1969 resolution regarding the need for additional schools in Northwest and East Yonkers was responded to in some detail by Superintendent Mitchell. GX 398. In most cases, however, City Council resolutions have been given little or no serious consideration by the Board or have been specifically rejected. Tr. 1410 (Del Bello); Tr. 8947 (Curran); Tr. 10,952, 11,032 (Jacobson). For example, a 1954 resolution requesting the Board to reconsider its decision to close the virtually all-black School 1 was unsuccessful in achieving its goal, and a 1971 resolution requesting the Board to rescind salary increases given to top school administrators was expressly rejected by the Board. C-1400. Thus, while City Council resolutions are indicative of the City's interest in and attempts to influence school affairs, there is an absence of concrete proof that these resolutions were a consistently successful means by which the City exercised any measurable degree of control over the Board.

3. School 4

The interrelationship between the City and the Board, and its effect on housing and school segregation, is illustrated with unmistakable clarity by the treatment accorded School 4. School 4, an elementary school on Trenchard Street in Southeast Yonkers, was one of seven schools closed by the Board in April 1976 as part of its fiscally motivated budget reductions. We have already discussed the City's actions with respect to the School 4 facility subsequent to its closing in 1976. *See* HOUSING V.F.3 *supra*. In this section of our findings, we focus specifically on the circumstances surrounding the Board's retention of the School 4 facility.

School 4 was one of seven schools which the Board closed in April 1976: Schools 3, 7, and 12 and Commerce Middle School in Southwest Yonkers, Schools 4 and 15 in East Yonkers, and School 24 in Northwest Yonkers. State law provides that once a school facility is no longer needed for educational purposes, the Board "shall notify the common council of such fact . . . and such common council . . . may then sell or dispose of such property in the manner in which other real property owned by the city may be sold or disposed of. . . ." N.Y. Educ. Law § 2556(9) (McKinney 1981). Immediately after the Board's decision to close the schools in 1976, City officials began to consider alternative plans for utilizing the school facilities in contemplation of the Board's returning these properties to the City. GX 1187.1, 1187.2.

As discussed previously in our findings, the 1976 school closings generated enormous community opposition, especially in neighborhoods previously served by Schools 4 and 15. During the summer of 1976, community members continued to voice their objections to the school closings and urged the Board to reconsider its decision to close the schools. P-I 58-71, 58-74. Mayor Martinelli was also actively involved in seeking to reopen Schools 4 and 15; with respect to School 4, Martinelli recommended that the Board reopen the facility as a K-8 school. Tr. 7543-45 (Martinelli). These efforts to reopen Schools 4 and 15 were unsuccessful, and the 1976-77 school year commenced with students from the closed schools reassigned to other schools in the surrounding neighborhoods.

Community opposition to the closing of Schools 4 and 15, however, did not subside. This opposition was expressed in a variety of forms: personal harassment of individual Board members; the creation of an alternative school in the School 15 community; the Mayor's commissioning of a traffic engineer to study the reassignment of former School 4 and 15 students; the institution of legal proceedings in New York State courts; and repeated expressions of opposition at Board meetings. *See*

year, the Board did not return the school to the City for disposition. Despite the City's precarious fiscal condition and the drastic budgetary cutbacks implemented by the Board in 1976, the Board retained the vacant School 4 facility, incurring expenses of approximately $40,000 to $50,000 a year to maintain the facility in a non-operative state. Tr. 7542-43 (Martinelli). By the late 1970's the Board had apparently abandoned any serious plans to either reopen the school or use the facility for other educational purposes. Instead, by 1979 School 4 began to be mentioned as a potential site for Section 8 subsidized housing units, while the Board continued to hold onto the property while making no educational use of the School 4 facility.

The City also exhibited little interest in either disposing of the facility or implementing some productive use. Subsequent to its closing in 1976, School 4 was recommended or otherwise under consideration for a variety of residential and commercial uses. P-I 199-6, 199-18. Such proposals, however, were generally resisted because of the possibility that City officials and community members would eventually persuade the Board to reverse its decision to close the school. Tr. 7517 (Martinelli). In 1978, VSP Co., a video and software production center, expressed an interest in acquiring the School 4 facility. The City dissuaded VSP from acquiring School 4 and instead sold the School 7 facility to VSP for a considerably lower consideration.

During 1979, by which time the efforts to reopen School 4 had subsided, School 4 began to be mentioned as a potential site for Section 8 subsidized housing. GX 1118.41, 1118.117; Tr. 7953-57 (Cipriani). In 1980, School 4 was included as one of fourteen possible housing sites submitted by the City to HUD, and was one of three sites which HUD subsequently found to be suitable for the development of subsidized housing. P-I 199-37, 199-40. However, as discussed previously in our findings, the City's actions with respect to the facility were clearly inconsistent both with any serious limitations on its ability to utilize the

School 4 facility as it deemed appropriate and with any sincere intent to secure its return for purposes of developing subsidized housing at that site. *See* HOUSING V.F.3 *supra*. As late as May 1981, City Manager Eugene Fox notified HUD that no schedule had been set for the return of School 4 to the City. GX 1140.29. In August 1981, Fox notified HUD that the City was still "continu[ing] to work towards effecting the transfer of Public School 4" from the Board in order to allow for its future use as subsidized housing. GX 1140.43; Tr. 8577-80 (Schiffman). As of the end of the year, however, the Board continued to retain the school in what was almost a six year period of inactivity. Tr. 7789 (Longo).

In early 1982, Acting City Manager Theodore Garofalo was notified of a developer's interest in converting the School 4 facility into condominiums. Gx 1170.7-1170.8. On March 16, the developer expressed similar interest to his successor, Sal Prezioso. GX 1170.9. Two days later, the Board and Superintendent Raymond were notified by Prezioso that a developer was interested in purchasing School 4 and converting it into "luxury-type housing". GX 1170.10. Within days, Superintendent Raymond informed Prezioso that the Board was reviewing the matter and that she had strongly recommended that the Board take some action with respect to the "unused" School 4 and 15 facilities. GX 1170.11. Three months later, the Board, now indicating that it had no plans to reopen the school or use the facility for any other educational function, returned the school to the City. P-I 199-52. Subsequently, the City proceeded toward the sale of the property to a private residential developer. An all-white citizen's committee from the School 4 area was appointed by Councilmenber Cipriani to evaluate re-use proposals; the committee, unguided by City planning officials or criteria, met with three developers and recommended Morelite Construction Company, a condominium builder; and the City Council, without prior public bidding and after an acrimonious public hearing at which the community expressed strong approval of the condominium proposal and

strong opposition to the possibility of developing subsidized housing at the site, voted to sell School 4 to Morelite. *See* HOUSING V.F.3 *supra*.

The City's involvement in the treatment of School 4 is illustrative of the subtle manner in which the City, assisted by the inaction of the Board, succeeded in its perpetuation of racial segregation in Yonkers. While there is little evidence of overt attempts to direct Board conduct through express communication or resolution discouraging the return of School 4 to the City, the simultaneous actions of the City and Board speak for themselves. Unlike its treatment of the other schools closed in 1976, which were either returned that year to the City, put to other educational use, or were initially unable to attract interested developers or buyers, School 4 remained in limbo to the clear financial detriment of the City, while the City engaged in a series of acts designed to impede the use of School 4 as a site for subsidized housing. Like the mayoral appointment process or the City Council's budgetary control over the school district, the City's conduct in this instance is not credibly justifiable simply by reference to state law. Instead, the Board's retention of School 4 is illustrative primarily of the manner in which the City, by its acts and omissions, utilized its relationship with the Board to successfully avoid the development of subsidized housing in East Yonkers. The sequence of events surrounding the City's treatment of the inoperative School 4 facility constitutes persuasive evidence of the City's discriminatory intent and its perpetuation of residential, and consequently school, segregation in Yonkers.

VI. CONCLUSIONS OF LAW

A. Jurisdiction

In the school-related portion of this case, the United States seeks to enforce the provisions of Title IV, Title VI and regulations thereunder, the fourteenth amendment, and contractual

assurances made by the Board in consideration of its continuing receipt of federal financial assistance. Complaint ¶ 1. Jurisdiction is alleged to be proper under 28 U.S.C. § 1345, 42 U.S.C. § 2000c-6, and 42 U.S.C. § 2000d-1. *Id.* ¶ 2. The NAACP alleges violations of Title VI, 42 U.S.C. § 1981 *et seq.*, the thirteenth and fourteenth amendments, and New York State law.[154] Complaint ¶ 20; p.11. Jurisdiction is alleged to be proper under 28 U.S.C. § 1343(3) and (4). *Id.* ¶ 3.

1. The Board of Education

The Board argues that the United States lacks standing and that this Court lacks jurisdiction over the United States' claims

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[154]The NAACP's claim of unlawful school segregation is not cognizable as a violation of the thirteenth amendment. *See Alma Society, Inc.* v. *Mellon*, 601 F.2d 1225, 1236-38 (2d Cir. 1979), *cert. denied*, 444 U.S. 995 (1980); *Parent Association of Andrew Jackson High School* v. *Ambach*, *supra*, 598 F.2d at 715. The NAACP's fourteenth amendment claim is cognizable as an alleged violation of 42 U.S.C. § 1983. *See Turpin* v. *Mailet*, 591 F.2d 426, 427 (2d Cir. 1979) (en banc) (per curium), *cert. denied*, 449 U.S. 1016 (1980). Finally, the clear weight of legal authority suggests that both the NAACP and the United States are empowered to sue to enforce the provisions of Title VI. *See Guardians Association* v. *Civil Service Commission*, 103 S.Ct. 3221, 3227-28 (1983) (White,J., joined by Rehnquist,J.); 3244-45 (Marshall,J.); 3250 (Stevens,J., joined by Brennan,J., and Blackmun,J.) (holding that provisions of Title VI may be enforced in a private action against recipients of federal funds); *Brown* v. *Califano*, 627 F.2d 1221, 1232 n.67 (D.C.Cir. 1980) (Attorney General has authority to initiate Title VI enforcement actions); *United States* v. *Marion County School District*, 625 F.2d 607, 609-17 (5th Cir. 1980) (same), *cert. denied*, 451 U.S. 910 (1981).

In its complaint, the NAACP also requests that this Court exercise pendent jurisdiction over its allegation that the defendants' conduct violates state law and grant equitable relief for such violation. *See* Complaint ¶¶ 3,4; p.11. The NAACP's state law claim has not been specifically addressed or pursued subsequent to the filing of its complaint except as noted herein. The Supreme Court also has recently held that federal courts are barred from awarding injunctive relief against state officials for violations of state law, and that this principle applies to state law claims brought into federal court under pendent jurisdiction. *See Pennhurst State School and Hospital* v. *Halderman*, 104 S.Ct. 900 (1984). This Court therefore lacks jurisdiction to adjudicate the NAACP's state law claim.

under either (1) Title IV, because the NAACP (the private complaining party) was able to initiate and maintain legal proceedings on its own behalf, or (2) Title VI, because the United States Department of Education did not attempt to secure voluntary compliance from the Yonkers School District prior to the initiation of this lawsuit, in accordance with applicable regulations. These contentions have been rejected in a previous Opinion of this Court. *See United States* v. *Yonkers Board of Education*, 80 Civ. 6761, slip op. at 1-2 (S.D.N.Y. Mar. 12, 1982). Accordingly, this Court has jurisdiction pursuant to the aforementioned statutes over the claims of the United States alleging unlawful school segregation by the Board. The Court also has jurisdiction, pursuant to 28 U.S.C. § 1343(3) and (4), over the NAACP's claims of unlawful school segregation brought pursuant to § 1983 and Title VI.

2. ***The City***

The City argues that the claims of the United States alleging unlawful school segregation by the City must be dismissed. Specifically, the City contends that the four enumerated bases for the United States' claim of school segregation — Title IV, Title VI, the fourteenth amendment, and contractual assurances by the Board — cannot properly serve as a basis for maintaining the school-related portion of this case against the City.

The United States concedes that its Title VI claim is asserted solely against the Board, and not the City. *See United States* v. *Yonkers Board of Education*, 518 F.Supp. 191, 201 (S.D.N.Y. 1981). In addition, the United States does not contend that its contractual claim is asserted against the City.

As for the remaining grounds, the City contends that the United States lacks standing to assert *Bivens*-type claims directly under the fourteenth amendment, *see id.* at 201, and that no statute authorizes the United States to assert alleged violations of the fourteenth amendment. Therefore, the City argues, this Court

lacks subject matter jurisdiction over the government's constitutional claim.

The City also argues that Title IV authorizes the Attorney General to initiate proceedings only against a "school board" and not against an entity such as the City of Yonkers, and that the government's allegations of unlawful school segregation by the City are therefore not cognizable under Title IV. According to the City, its lack of control over Board conduct and its lack of responsibility for the operation of the Yonkers public schools preclude the United States from asserting a claim of unlawful school segregation against the City pursuant to Title IV.

As for the constitutional claim, several circuit courts have held that the United States lacks standing under the Constitution to assert the constitutional claims of others. *See United States* v. *Philadelphia*, 644 F.2d 187 (3d Cir. 1980) (challenging city police department practices); *United States* v. *Mattson*, 600 F.2d 1295 (9th Cir. 1979) (challenging conditions in state mental hospital); *United States* v. *School District of Ferndale*, 577 F.2d 1339, 1345-46 (6th Cir. 1978) (school desegregation suit brought under Equal Educational Opportunities Act); *United States* v. *Solomon*, 563 F.2d 1121 (4th Cir. 1977) (challenging conditions in state mental hospital);[155] *see also Estelle* v. *Justice*, 426 U.S. 925 (1976) (Rehnquist, J., joined by Burger,C.J., and Powell,J., dissenting from denial of petition for writ of certiorari) (suggesting, in suit challenging state prison conditions, that United States lacks inherent standing to assert constitutional claims of others). *Cf. Halderman* v. *Pennhurst State School and Hospital*, 612 F.2d 84, 90-92 (3d Cir. 1979) (en banc) (allowing United

[155]While *Mattson* and *Solomon* were followed by congressional authorization of suits by the Attorney General challenging conditions of state mental hospitals, 42 U.S.C. § 1997, this subsequent development does not undermine and to a certain extent reinforces the conclusion that the United States lacks standing to bring suit directly under the Constitution absent statutory authorization to do so. *See* page 480a *infra* (discussing *Ferndale*).

States to intervene in already-commenced § 1983 suit but not deciding issue of governmental standing to initiate suit directly under Constitution), *rev'd on other grounds*, 451 U.S. 1 (1981). While the first three decisions cited above relied primarily on the absence of congressional authorization of the type of lawsuit initiated by the United States, the existence of Title IV does not necessarily compel the conclusion that the United States has standing to institute school desegregation cases directly under the Constitution as well. Indeed, the *Ferndale* decision is astute in its recognition that to permit the government to assert constitutional claims in school desegregation cases by suing directly under the Constitution would allow it to circumvent Title IV's procedural prerequisites to the assertion of equal protection violations in school desegregation cases. 577 F.2d at 1345-46. Accordingly, the existence of statutory authorization to initiate school desegregation cases would appear to reinforce, rather than undermine, the conclusion that the United States lacks standing directly under the Constitution to assert the constitutional claims of others.

It is equally clear, however, that Title IV authorizes the United States to enforce the equal protection guarantee of the fourteenth amendment. *See Brown* v. *Califano*, 627 F.2d 1221, 1232 n.67 (D.C.Cir. 1980) ("[T]he Department of Justice has standing to enforce the guarantees of equal protection, as embodied in Title IV"); *United States* v. *School District of Ferndale*, *supra*, 577 F.2d at 1346 n.12 ("Of course, there is nothing to prevent the Attorney General from asserting violations of the EEOA and the fourteenth amendment in the same complaint where relief is sought under both the EEOA and Title IV.") (emphasis deleted). This conclusion is supported by the language of the statute itself, *see* 42 U.S.C. § 2000c-6(a) ("Whenever the Attorney General receives a complaint . . . that . . . children . . . are being deprived by a school board of the equal protection of the laws, . . . the Attorney General is authorized . . . to institute for or in the name of the United States a civil action. . ."), and has been implicitly recognized in prior school desegregation suits brought

by the United States. *See e.g., United States* v. *Texas Education Agency*, 467 F.2d 848, 853 (5th Cir. 1972) (en banc) (suit brought by United States under Title IV; court found equal protection violation); *United States* v. *School District 151 of Cook County*, 404 F.2d 1125, 1127-28 (7th Cir. 1968) (same), *cert. denied*, 402 U.S. 943 (1971); *see also United States* v. *Massachusetts Maritime Academy*, 762 F.2d 142, 148 (1st Cir. 1985). Thus, the United States has standing to enforce the equal protection clause of the fourteenth amendment by virtue of the express statutory authorization provided by Title IV.

The remaining novel issue, then, is whether Title IV authorizes a suit by the United States against a municipal entity such as the City of Yonkers.[156] In this regard, we note that the language of the statute is not as limited as the City suggests. While referring to the government's receipt of a complaint that a "school board" is denying students the equal protection of the laws and the government's obligation to provide pre-litigation notice to the appropriate "school board" of such a complaint, the statute also authorizes the Attorney General to institute a civil action "against such parties and for such relief as may be appropriate." 42 U.S.C. § 2000c-6(a). Thus, while Title IV enumerates procedural prerequisites to government-initiated school desegregation suits, nothing in the statute expressly precludes the United States from initiating such suits against parties other than school boards so long as these prerequisites have been satisfied. In addition, the statute permits the government to implead "such additional parties as are or become necessary to the grant of effective relief hereunder," thus permitting the City to be properly included as a party to any remedial proceedings insofar as both the United States and the NAACP are concerned. *Cf. Plaquemines Parish*

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[156]In the only other directly comparable decision involving municipal liability for school segregation, the claims were asserted by private litigants under § 1983 and the fourteenth amendment. *See Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 909.

School Board v. *United States*, 415 F.2d 817 (5th Cir. 1969) (permitting addition of Commission Council to school desegregation case pursuant to Title IV in order to prevent council from transferring school property). Finally, it is clear that this Court has jurisdiction over the NAACP's constitutional claim, brought pursuant to § 1983, of unlawful school segregation by the City under 28 U.S.C. § 1343 and thus the City is in any event a proper party to the liability phase of this lawsuit. *See Arthur* v. *Nyquist*, *supra*. Since allegations of intentional school segregation against parties other than school boards may be made by private litigants, we see little policy justification for more narrowly circumscribing the scope of potential parties who may be included as defendants in school desegregation cases initiated by the government under Title IV, particularly since the statute expressly contemplates the impleading of additional parties by the government for purposes of implementing remedial measures.

The Sixth Circuit's interpretation of a similar provision contained in the Equal Education Opportunities Act of 1974, 20 U.S.C. § 1701 *et seq.* ("EEOA"), supports our conclusion that the City may be included as a defendant in the school desegregation portion of this case pursuant to Title IV. In *United States* v. *School District of Ferndale*, *supra*, the Sixth Circuit upheld the Attorney General's authority to include state officials in a school desegregation action brought pursuant to the EEOA. That statute, like Title IV, authorizes the Attorney General to institute enforcement proceedings "against such parties, and for such relief, as may be appropriate." In *Ferndale*, the district court held that the state defendants (the State of Michigan, the Governor, the Michigan State Board of Education, and the Michigan Superintendent of Public Instruction) were not subject to suit under the EEOA because they were not the "educational agency" which had allegedly denied individuals the right to equal educational opportunity. The court noted that the EEOA, unlike Title IV, does not authorize the Attorney General to implead additional parties for purposes of granting relief for the statutory

violations of educational agencies. 400 F.Supp. at 1138-39. The Sixth Circuit reversed, finding that the indirect assistance provided by the state defendants through their financial support of the local school district and their potential involvement in future remedial phases rendered them "appropriate" parties to the litigation. 577 F.2d at 1347-48. While the legal relationship between the state and local defendants in *Ferndale* and the City and school officials in Yonkers is not precisely analogous, the City's budgetary and other indirect involvement in school affairs and the more expansive provisions of Title IV provide an appropriate basis for permitting the government to include the City as a party to its Title IV enforcement action.

We recognize that federalism and separation of powers principles have, in other circumstances, been recognized as relevant in determining the government's power to challenge the allegedly unconstitutional conduct of local governmental entities. *See United States* v. *City of Philadelphia*, *supra*, 644 F.2d at 199-203; *United States* v. *Mattson*, *supra*, 600 F.2d at 1300-01; *United States* v. *Solomon*, *supra*, 563 F.2d at 1128-29. The separation of powers concern of these decisions, however, was articulated as a reason for refusing to grant the United States standing to sue directly under the Constitution to challenge the allegedly unlawful operation of a state governmental entity. As noted previously, this holding was based primarily on the absence of any congressional authorization for the type of lawsuit initiated by the government, a circumstance which is not present in the instant case. The separation of powers concern of these decisions is thus inapposite in the circumstances of the instant case.

As for federalism concerns, we are unable to find any authority suggesting that the principle of federalism may serve as a legitimate impediment to the initiation of school desegregation suits against any and all parties who have contributed to the allegedly unlawful condition with the requisite intent. Indeed, we fail to see how the initiation of a school desegregation suit against

a municipality is any more intrusive as a matter of federal-state relations than the initiation of such a suit against a school board, a suit which has never been considered to be inconsistent with our federal system of government. In this connection, we reject the City's reliance on the Board's responsibility under state law for the operation of the Yonkers public schools as a reason for precluding the government from proceeding against the City for the City's allegedly unlawful role in creating or maintaining the racial segregation of these schools. In light of the allegations of City involvement in school affairs and intentional housing discrimination, the City's separate legal status under state law cannot properly serve as a limit on the scope of congressionally granted governmental authority under Title IV to enforce federal constitutional guarantees against state and local governmental authorities whose acts and omissions create or substantially contribute to school segregation.

The Supreme Court's recognition of the importance of federalism principles in the development of federal constitutional jurisprudence is not inconsistent with this conclusion. Three decisions in particular have become particularly noteworthy in their recognition of federalism principles as a limit on the authority of federal courts to intervene in the operations of state and local government entities. *See National League of Cities* v. *Usery*, 426 U.S. 833 (1976); *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Younger* v. *Harris*, 401 U.S. 37 (1971). None of these decisions, however, suggest that municipal liability in the circumstances of the instant case would violate these federalism principles.

The *Younger* doctrine, setting limits on the extent to which federal courts may interfere with ongoing state judicial proceedings, is premised on the legitimate interest of the states in enforcing its own laws. 401 U.S. at 44-45, 51-52. *Rizzo* extended this principle to the executive branch of state and local governments, holding that a federal court injunction ordering a local police department to implement a variety of prophylactic proce-

dures designed to minimize misconduct by its employees violated federalism principles by unduly interfering in the internal affairs and operations of a police department whose policies and practices were not shown to be unlawfully discriminatory. 423 U.S. at 377-80. Neither case suggests that a local governmental entity whose policies and practices are shown to be intentionally discriminatory and result in the racial segregation of its housing and schools may not be held liable for such conduct in federal court, with appropriate remedies commensurate with the constitutional or statutory violation. Unlike a state's interest in enforcing state law or a police department's interest in developing its own operational procedures free of intensive federal supervision,[157] the City's alleged violation of Title VIII, along with its allegedly segregative conduct affecting Yonkers public schools, cannot lay similar claim to federal judicial deference based on the desire to avoid interference with the legitimate operations of state and local governmental entities. The government in this case does not seek to disrupt or obtain federal judicial supervision over the workings of a judicial, legislative or executive agency which has engaged in the legitimate and lawful exercise of its state authority; instead, it seeks to hold a municipality liable for its implementation of discriminatory policies and practices in violation of federal constitutional and statutory rights. As noted previously, the government's claims against the City are difficult to distinguish, as a matter of federalism, from its claims against the Board; we find it inappropriate to create federalism-based obstacles to the government's initiation of either type of lawsuit.

As for *Usery*, the Supreme Court has recently overruled the *Usery* decision. *See Garcia* v. *San Antonio Metropolitan Transit*

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[157]The *Rizzo* decision also was based on the absence of any proof that the defendant municipal authorities had played any affirmative role in the deprivation of constitutional rights by police department employees, a necessary prerequisite to municipal liability under § 1983. 423 U.S. at 373-77. The City does not contend that its housing and school-related policies and practices are an insufficient predicate for liability in this respect.

Authority, 105 S.Ct. 1005 (1985). We also note that the *Usery* decision, which held that certain areas of state governmental activity are constitutionally immune from federal regulatory power, in no way contemplated similar protection from the federal government's authority to enforce the substantive provisions of the fourteenth amendment. *See Hunter* v. *Underwood*, 105 S.Ct. 1916, 1923 (1985); *Monell* v. *Department of Social Services*, 436 U.S. 658, 690 n.54 (1978); *Fitzpatrick* v. *Bitzer*, 427 U.S. 445, 453 n.9 (1976).

In conclusion, we hold that the United States has the authority under Title IV to assert its claim of unlawful school segregation by the City of Yonkers, and that this Court has jurisdiction over the government's claim of unlawful school segregation by the City pursuant to 28 U.S.C. § 1345 and 42 U.S.C. § 2000c-6. This Court also has jurisdiction over the NAACP's claim of unlawful school segregation by the City pursuant to 28 U.S.C. § 1343(3) and (4).

B. Liability

As noted at the outset of this Opinion, this case is not simply another in a long line of school desegregation cases. Few cases have involved tangible inequalities in educational opportunity, as we have discussed this term, which have so closely paralleled and become intimately bound up with racial imbalance. Few cases have arisen in a political setting in which school board policy was as subject to municipal influence as in Yonkers. No case has ever previously been brought in which a court was asked to determine the liability of state actors for both housing and school segregation. And no case has ever considered the legal ramifications of the confluence of these unique and important considerations. We must therefore examine closely each of these considerations, together with the other acts and omissions of the school board, in order to determine whether legal responsibility for the racial segregation of Yonkers public schools may properly be placed with the Board or the City, or both.

1. *The Board of Education*

a. *Independent Conduct of School Authorities*

The record has demonstrated an absence of any consistent pattern of segregative school openings or closings or racial gerrymandering of attendance lines which have had systemwide segregative impact. Individual, deliberately segregative school opening, closing, and attendance zone decisions, however, have occurred. The consistent impact of these decisions — the setting and adherence to School 1's original attendance zone boundaries (1938 to 1954), the events leading up to attendance zone boundary changes between Schools 6 and 25 (1948), the pattern of segregative changes to the attendance zone boundary separating Schools 16 and 25 (1953-68), the reassignment of minority Runyon Heights students from Emerson to Burroughs (1973), the opening of Commerce Middle School (1973) — was to avoid the assignment either of Northwest Yonkers white students to disproportionately minority schools or of minority students to disproportionately white Northwest Yonkers schools. While most of these decisions were followed by subsequent developments with respect to the particular school or group of students which were desegregative in varying degrees — the closing of School 1 (1954), the redrawing of the School 6/25 attendance zone boundary (1948), the reassignment of Runyon Heights students from Burroughs to Whitman (1978), the closing of Commerce Middle School (1976) — these decisions nevertheless have reinforced the racial imbalance between Southwest and Northwest Yonkers schools and thus contributed to the racial identifiability of these areas.

The segregated condition of many Southwest Yonkers schools (elementary schools in particular) cannot be similarly traced to affirmative, intentionally segregative changes in attendance zones or student assignment decisions. The Board, however, has not completely eschewed segregative decisionmaking in other areas of school operations affecting Yonkers public schools. In

four areas, the Board has engaged in unlawfully discriminatory acts and omissions, all of which have had systemwide impact and have served to perpetuate racial segregation in public schools and discriminatory attitudes in the Yonkers community. Thus, while the Board's perpetuation of school segregation in Yonkers was not overt or explicitly proclaimed, the Board has affirmatively contibuted to an appreciable degree to this condition.

One area in which the Board has exhibited segregative intent with current segregative impact is in the assignment of faculty and administrative staff. The intentional segregation of school faculty is an important factor in evaluating whether a school board has acted with segregative intent in the operation of its school system as a whole. *See Swann* v. *Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971); *Diaz* v. *San Jose Unified School District*, *supra*, 733 F.2d at 670; *Reed* v. *Rhodes*, *supra*, 607 F.2d at 725; *Oliver* v. *Michigan State Board of Education*, *supra*, 508 F.2d at 185; *Arthur* v. *Nyquist supra*, 415 F.Supp. at 945. While such segregation does not establish a *prima facie* case of intentional segregation of students, *see Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 536 n.9, it is nevertheless a significant indication of school board intent in general. In addition, while the segregation of faculty is not necessarily a substantial or significant causal factor in the perpetuation or exacerbation of school segregation, *see Diaz* v. *San Jose Unified School District*, 518 F.Supp. 622, 641 (N.D.Cal. 1981), *rev'd on other grounds*, 733 F.2d 660, 670 (9th Cir. 1984) (en banc), *cert. denied*, 105 S.Ct. 2140 (1985); *Alexander* v. *Youngstown Board of Education*, 454 F.Supp. 985, 1072 (N.D.Ohio 1978), *aff'd*, 675 F.2d 787 (6th Cir. 1982); *Higgins* v. *Board of Education of Grand Rapids*, 395 F.Supp. 444, 478-79 (W.D.Mich. 1973), *aff'd*, 508 F.2d 779 (6th Cir. 1974), such segregation frequently has been found to be a significant contributor to school segregation. *See Reed* v. *Rhodes*, *supra*, 607 F.2d at 725; NAACP v. *Lansing Board of Education*, *supra*, 559 F.2d at

1052; *Morgan* v. *Kerrigan*, *supra*, 509 F.2d at 597-98; *Armstrong* v. *O'Connell*, *supra*, 463 F.Supp. at 1306-07.

The Board's staff assignment practices are significant both as a matter of intent and segregative impact. The assignment of disproportionate numbers of minority staff to disproportionately minority schools in Southwest Yonkers served as a clear indication that racial segregation was acceptable even where residential segregation and transportation concerns did not impede the implementation of race-neutral assignment policies. While the mathematical extent of staff segregation in Yonkers public schools was not overwhelming, the Board's assignment policies had an appreciable impact on the schools, with their most segregative impact occurring during the period of most intensive subsidized housing development in Southwest Yonkers. *Cf. Diaz* v. *San Jose Unified School District*, *supra*, 518 F.Supp. at 641 (insignificant segregative impact found where faculty segregation exceeded 15% minority staff in any one school in only two instances). The segregation of staff not only impacted upon Southwest and East Yonkers schools in a racially segregative fashion, but also was exacerbated by the relative inexperience of minority staff members and by the assignment of minority Special Education teachers to predominantly white schools. *Cf. Morgan* v. *Kerrigan*, *supra*, 509 F.2d at 596; *Berry* v. *Benton Harbor*, *supra*, 442 F.Supp. at 1301-02. The district's belated and limited efforts to rectify this condition did not eliminate the segregative impact of its previous assignment practices. Like the City's confinement of subsidized housing to Southwest Yonkers, the Board's staff assignment practices are most significant by virtue of the confirmatory impact which they had on racial segregation in Yonkers public schools as a whole.

The Board's vocational education program has also been affected by the discriminatory practices over the years. The steering of minority students into such programs, followed by the continued adherence to knowingly segregative screening policies,

both operated to deprive minorities (particularly blacks) of equal educational opportunities on the secondary school level. As with staff assignments, school authorities were for many years relatively unresponsive to the acknowledged disproportion in minority enrollment in vocational programs and did relatively little to overcome the previously created disincentives for enrolling in these programs. As a consequence, minority students were disproportionately affected by inadequacies in the secondary school curriculum at Gorton and Yonkers High Schools, a condition which also existed for several years.

The district's operation of its Special Education program, while not "segregative" in and of itself, was nevertheless marked by discriminatory treatment of minority students which served to reinforce community opposition to desegregation. Minority students not only were assigned in disproportionate numbers to such classes but also were accorded treatment entirely inconsistent with the Board's general neighborhood school policy. While the district made concerted efforts to rectify discriminatory aspects of the program, the impact of its prior practices, along with other unremedied practices, continued up to the filing of this lawsuit. The operation of the Special Education program reinforced discriminatory community attitudes toward minorities in a manner consistent with the City's implicit recognition of and responsiveness to similar attitudes in its development of subsidized housing policies. *Cf. United States* v. *Texas Education Agency*, *supra*, 600 F.2d at 526-27 (foreseeable and unforeseen segregative impact of intentionally discriminatory act constitutes part of constitutional violation); *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 929 (discussing significance of school board conduct which contributes to discriminatory attitudes of white community members).

The Board's student assignment practices on the secondary school level were also marked in some instances by segregative intent. While the Board closed Commerce in 1976 and reassigned some of its minority students to Emerson, this action was taken only after the Board's deliberately segregative opening of Com-

merce three years earlier. In addition, the district maintained the Longfellow and Fermi facilities in an underutilized and racially imbalanced condition despite the availability of additional space at physically superior, predominantly white East Yonkers schools and the proximity of white East Yonkers middle school students to these two Southwest Yonkers schools. The frequently mentioned possibility of effectuating desegregation among the district's high schools was acted upon only in 1973 (the Homefield redistricting) despite the acknowledged limited relevance of neighborhood school policy considerations in determining secondary school student assignments.

The Board's rejection of desegregative school reorganization proposals is also relevant to the liability determination. Under similar circumstances, The Supreme Court has held that

> The question of whether a rescission of previous board action is in and of itself a violation of appellants' constitutional rights is inextricably bound up with the question of whether the Board was under a constitutional duty to take the action which it initially took . . . . If the Board was not under such a duty, then the rescission of the initial action in and of itself cannot be a constitutional violation. If the Board was under such a duty, then the rescission becomes a part of the cumulative violation, and it is not necessary to ascertain whether the rescission *ipso facto* is an independent violation of the Constitution.

Dayton Board of Education v. *Brinkman,* 433 U.S. 406, 414 (1977) (*quoting Brinkman* v. *Gilligan,* 503 F.2d 684, 697 (6th Cir. 1974)).[158] Other courts have similarly noted that the rejec-

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[158]While *Dayton* involved the rescission of a previous school board's resolutions acknowledging responsibility for creating segregative racial patterns and calling for various types of remedial measures, we see no constitutionally relevant distinction between such conduct and a school board's refusal to implement a desegregation proposal in the first instance such that the latter decision could be considered any less an indication of segregative intent.

tion of integrative proposals, while not unlawful by itself, is evidence of segregative intent which, along with other evidence of intent, can form the basis for a finding of unlawful school segregation. *Armstrong* v. *Brennan, supra,* 539 F.2d at 636 ("In finding discriminatory intent, the District Court could properly consider, together with other evidence, defendants' refusal to adopt integration proposals [citations omitted], even though that refusal alone would not prove the requisite intent."), *vacated on other grounds,* 433 U.S. 672 (1977)[159]; *Oliver* v. *Michigan State Board of Education, supra,* 508 F.2d at 186 (revocation of desegregation plan "in light of the prior cumulative constitutional violation by the school authorities, is further evidence of the Board's racially segregative purpose").

Consistent with the above principles, the rejection of or failure to implement school desegregation plans has been the basis for a finding of unlawful segregation in two general contexts. First, the failure to implement school desegregation plans, particularly when in response to racially motivated community opposition, has been deemed unlawful where the state has previously been found to have operated a dual school system. *See Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 13; *Green* v. *County School Board,* 391 U.S. 430, 437-438 (1968); *Cooper* v. *Aaron,* 358 U.S. 1, 15-16 (1958). In such cases, a school board is under a legal obligation to eliminate the segregative effects of prior *de jure* segregation, and courts have held that community resistance to the performance of such an

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[159]Although *Armstrong* was vacated and remanded by the Supreme Court, the Court's decision was based on the "unexplained hiatus" between the lower court's findings and conclusions regarding segregative intent, and on the need for the lower courts to evaluate the Supreme Court's decision in *Dayton Board of Education* v. *Brinkman* (rendered two days earlier) in formulating a remedial plan. *Brennan* v. *Armstrong,* 433 U.S. 672, 672-73 (1977); *see NAACP* v. *Lansing Board of Education, supra,* 559 F.2d at 1047-48 & n.6. We do not interpret this subsequent development as undermining the legal principles for which *Armstrong* is cited in text.

obligation cannot justify a failure to remedy school segregation. *See, e.g., United States* v. *Scotland Neck City Board of Education,* 407 U.S. 484, 491 (1972); *Monroe* v. *Board of Commissioners of Jackson,* 391 U.S. 450, 459 (1968).

Second, the refusal to implement desegregation plans has been held to constitute a basis for a finding of unlawful school segregation where this refusal has been combined with other affirmative acts of segregation. In the principal cases in which such findings have been made, the respective school boards were also found to have engaged in a number of other acts involving student assignment policies which were clearly consistent, in terms of segregative intent, with the refusal to desegregate. *See Arthur* v. *Nyquist, supra,* 573 F.2d at 144-45 (redistricting of high school, language transfer policy, districting of junior high school, use of optional attendance zone areas, discriminatory vocational school admission policy, and racially discriminatory staff recruiting and assignment); *Armstrong* v. *Brennan, supra,* 539 F.2d at 629-32 (pattern of segregative boundary changes, intact busing, open transfer policy, and faculty segregation); *Morgan* v. *Kerrigan, supra,* 509 F.2d at 586-98 (segregative reassignments and use of portable classrooms in response to overcrowding, use of segregative feeder patterns and transfer options, open enrollment and controlled transfer policies, discrimination in staff assignment and promotion, and segregative redistricting); *Oliver* v. *Michigan State Board of Education, supra,* 508 F.2d at 185-86 (segregative attendance zone policy, school construction and siting policy, staff assignment policy, conscious neglect of opportunities to decrease segregation, lack of minority staff); *United States* v. *School District 151, supra,* 404 F.2d at 131-32 (segregative transfer policy, boundary changes, busing policy, and faculty assignments, affecting three of district's six schools).

In our view, the Yonkers Board of Education's refusal to adopt desegregative school reorganization proposals does not fall precisely within either category of cases. The Board has not failed

to fulfill an obligation to dismantle a dual school system; nor has it engaged in what, standing alone, could fairly be characterized as a significant number of affirmative acts of intentional segregation in the area of student assignments, particularly on the elementary school level. This fact, however, does not end our inquiry into the legal significance of the Board's failure to adopt desegregative reorganization plans for Yonkers public schools. In our opinion, two other critical factors must be examined before this issue can be properly resolved.

b. Denial of Equal Educational Opportunity

The Yonkers public schools not only are racially segregated, but also are unequal in the quality of educational opportunity afforded to students in these schools. As a factual matter, the existence of such disparities has clearly worked to the disadvantage of minority students, who for many years have received their educational instruction in generally inferior facilities, from generally less experienced staff, in generally more overcrowed and unstable conditions. On the secondary school level, minority students were generally more likely to be deprived of the full benefits of the district's academic and vocational programs.

The significance of the disparities in educational opportunities in Yonkers public schools lies, for these purposes not in the manner of their creation but in the reasons underlying their perpetuation. Disparities in the quality of school facilities, the scope of curricular offerings, staff experience, or student enrollment and turnover, were not created by discriminatory allocations of funds or other resources; some disparities existed well before the presence of significant numbers of minorities in the city. *Cf. Bell* v. *Board of Education, Akron Public Schools,* 491 F.Supp. 916, 941 (N.D.Ohio 1980), *aff'd,* 683 F.2d 963 (6th Cir. 1982); *Berry* v. *Benton Harbor, supra,* 442 F.Supp. at 1306. At the same time, however, the Board's more recent conduct served to perpetuate many of these inequalities, thus depriving many minority students of an educational experience comparable to that availa-

ble at other public schools in Yonkers. Such a condition was not simply a foreseeable result of the Board's segregative policies and practices. *Cf. NAACP* v. *Lansing Board of Education, supra,* 429 F.Supp. at 602-04; *Oliver* v. *Kalamazoo Board of Education,* 368 F.Supp. 143, 174-75 (E.D.Mich. 1973) (school board found liable where result of board's school construction and boundary policy was that "old schools were left to Blacks"), *aff'd,* 508 F.2d 178 (6th Cir. 1974), *cert. denied,* 421 U.S. 963 (1975). Rather, this is a case in which school authorities essentially acknowledged the disparities in educational opportunity in the district and the fact that some form of desegregative school reorganization would be necessary to alleviate these disparities. The district did implement some measures to address these inequalities, such as closing old, racially imbalanced schools in Southwest Yonkers (1976), the consequent rise in staff experience in those schools, and improvements in secondary school curriculum. However, the district repeatedly refused to implement more comprehensive desegregative measures to correct these disparities — the failure to proceed with desegregation efforts in the early 1970's, the rejection of the NYU Report proposals, and the refusal to adopt any of the Task Force or Phase II desegregation proposals or any alternative to these proposals — partly because of the desegregative consequences which such proposals would have entailed. This racially influenced failure to implement desegregative school reorganization proposals resulted in the perpetuation of the remaining educational inequalities among the district's schools.

The identifiability of schools as "minority" and "white" based on educational and physical disparities has been considered an indication of unlawful segregation in cases involving state-mandated dual school systems, *see Swann* v. *Charlotte-Mecklenburg Board of Education, supra,* 402 U.S. at 18, and in cases in which school authorities have otherwise been responsible for creating unlawfully segregated schools by their own discriminatory conduct, *see Oliver* v. *Michigan State Board of Education, supra,* 508 F.2d at 185; *Berry* v. *Benton Harbor, supra,* 442

F.Supp. at 1302. While the disproportionate expenditure or allocation of resources to benefit white schools rather than minority schools is one obvious basis for a finding of intentional discrimination in the provision of educational opportunity, *see Berry* v. *Benton Harbor, supra,* 442 F.Supp. at 1306, we believe that these disparities have legal significance here as well. The denial of educational opportunities in Yonkers has transcended the lack of the "melting pot" effect of racial integration; it has instead been characterized by tangible inequalities in the quality of education similar to those which characterized the inherently unequal segregated schools proscribed in *Brown* and its progeny. In this case, although the City's intentional housing discrimination contributed substantially to the continued confinement of minorities in educationally inferior schools, the school board also knowingly maintained and perpetuated considerable inequality in educational opportunity in the schools, its failure to rectify this condition being partly attributable to its refusal to implement reorganization proposals such as the NYU Report proposals (or suggested alternatives), the Task Force proposals, Phase II, or any desegregative alternative to these plans. In our view, the significant disparities in educational opportunity described in our factual findings and the circumstances surrounding their perpetuation are important factors in determining whether the Board is legally responsible for perpetuating the segregated condition of Yonkers public schools.[160]

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[160]We note that a duty to alleviate racial segregation in public schools had been imposed at one time as a matter of state law where such segregation denies minority students equal educational opportunities. *See People* v. *San Diego Unified School District,* 19 Cal.App.3d 252, 96 Cal.Rptr. 658 (1971). The California appellate court based this duty on the previous judicially-established state law principle that school boards are required to take reasonably feasible steps to alleviate racial imbalance in schools regardless of its cause. *Id.* at 665-66. As our discussion in text makes clear, the Board's liability in this case is based on a considerably different legal foundation.

c. Subsidized Housing Discrimination

The manner in which the racial segregation of Yonkers public schools has developed requires us to examine the relevance of a city's discriminatory housing practices to the liability of school authorities for school segregation. *Cf. Arthur* v. *Nyquist, supra,* 573 F.2d at 145 n.22 (expressly declining to determine relevance of public housing descrimination in school desegregation case); *Hart* v. *Community School Board, supra,* 512 F.2d at 56 (city, state and federal housing authorities held not liable on the merits for housing policies); *Brody-Jones* v. *Macchiarola, supra,* 503 F.Supp. at 1236-37 & n.27 (absence of findings regarding governmental housing practices; court noted that housing authority was not a party to litigation). While we do not decide this case on an entirely clean slate, the collective wisdom of the courts with respect to this issue has yet to result in a consistent legal principle capable of definitive application to the unique circumstances of this case.

Several earlier school desegregation cases discussed the relevance of public housing discrimination in the context of determining the constitutionality of school board adherence to a neighborhood school policy. These cases generally held that a school board's application of a neighborhood school student assignment policy was constitutionally unacceptable where discriminatory public housing practices had contributed to the racial segregation of the neighborhoods. *See United States* v. *Texas Education Agency, supra,* 467 F.2d at 863-64 n.22 ("When the segregated housing patterns are the result of 'state action', we are faced with *double* discrimination.") (emphasis in original); *Arthur* v. *Nyquist, supra,* 415 F.Supp. at 968-69 ("Given the purposeful residential segregation in the City of Buffalo, the School Board's 'neighborhood school policy' was not, and could not be, racially neutral"); *Oliver* v. *Kalamazoo Board of Education, supra,* 368 F.Supp. at 183 ("The school board should not be heard to plead that its neighborhood school policy was racially

neutral when in fact 'state action under the color of law' produced or helped to produce the segregated neighborhoods in the first place."). *But see Deal* v. *Cincinnati Board of Education, supra,* 369 F.2d at 60 n.4 (evidence of public and private housing discrimination properly excluded from school desegregation case against school board).

More recently, courts have expressed some reservations as to the legal validity of this conclusion. Starting with the opinion of three Supreme Court Justices in *Austin Independent School District* v. *United States,* 429 U.S. 990 (1976), and continuing with a series of Sixth Circuit rulings, recent school desegregation decisions have suggested that school officials cannot be held liable for racial imbalance in the schools which results from the discriminatory housing practices of other governmental actors. *See Austin, supra,* 429 U.S. at 994 (Powell,J., concurring, joined by Burger,C.J., and Rehnquist,J.) ("The principal cause of racial and ethnic imbalance in urban public schools across the country — North and South — is the imbalance in residential patterns. Such residential patterns are typically beyond the control of school authorities. For example, discrimination in housing — whether public or private — cannot be attributed to school authorities. Economic pressures and voluntary preferences are the primary determinants of residential patterns.") (footnote omitted); *Bell* v. *Board of Education, Akron Public Schools,* 683 F.2d 963, 968 (6th Cir. 1982) ("Under [the argument that a school board otherwise innocent of segregative intent is liable for the discriminatory housing practices of other governmental agencies] the discriminatory conduct of the FHA in making housing loans and local housing authorities in the construction and rental of public housing is attributable to school boards. Such a proposal places too heavy a burden on the schools to remedy wrongs for which they are no more or less responsible than the plaintiffs, the courts, the churches, the Congress or other institutions. Plaintiffs do not suggest how the schools, after a finding of liability, would go about remedying this problem or what kind of order a federal

court could enter that might as a practical matter have a chance of changing the fact that black and white families live in separate neighborhoods in most towns and cities."); *Higgins* v. *Board of Education of Grand Rapids, supra,* 508 F.2d at 788-89 ("In *Deal* . . . , this Court decided that discrimination by other than school authorities cannot be relied upon as the sole basis for showing a violation by the school board."); *Bronson* v. *Board of Education of the City School District of Cincinnati,* 578 F.Supp. 1091, 1104-05 (S.D.Ohio 1984) (citing *Bell* and *Deal*); *see also Jenkins* v. *Missouri,* No. 77-0420-CV-W-4, slip op. at 42 (W.D.Mo. June 5, 1984) (denying interdistrict school desegregation remedy).

In addition, some of the earlier precedents discussed previously have either lost some of their precedential weight or are factually distinguishable from this case. The *Texas Education Agency* decision also held that a school board's assignment of students and implementation of school site selection and construction policies based on segregated housing patterns, whether publicly or privately caused, is unconstitutional; a subsequent decision in that litigation more explicitly equating adherence to a neighborhood school policy in a residentially segregated district with segregative intent was vacated by the Supreme Court in *Austin.* 429 U.S. at 991-92 n.1. *Arthur* v. *Nyquist,* decided prior to *Austin,* involved evidence of a host of school board acts and omissions which were designed to perpetuate and enhance segregation in the schools. In the instant case, the record contains substantially less (or no) evidence of many of the classic segregative student assignment techniques — optional or non-contiguous attendance zones; segregative out-of-district transfer policies; a pattern of segregative school openings, closings, or racial gerrymandering of attendance lines — some of which were found to exist to a significant degree in *Arthur.*

The legal relevance of public housing discrimination to school segregation, however, has not been definitively resolved. A number of cases decided prior to *Austin* expressly or implicitly

declined the opportunity to examine the relevance *vel non* of public housing discrimination in a school desegregation case. *See Milliken* v. *Bradley*, 418 U.S. 717, 728 n.7 (1974); *Swann* v. *Charlotte-Mecklenburg Board of Education*, *supra*, 402 U.S. at 23; *Arthur* v. *Nyquist*, *supra*, 573 F.2d at 145 n.22; *see also Oliver* v. *Michigan State Board of Education*, *supra*, 508 F.2d at 183-85 (affirming lower court finding of segregative intent on other grounds). Even the Sixth Circuit's decisions are premised on the notion that housing discrimination cannot serve as a basis for finding school board liability for school segregation in the absence of any evidence that school officials themselves have engaged in intentionally segregative conduct, a circumstance *not* present here. *Bell* v. *Board of Education, Akron Public Schools*, *supra*, 683 F.2d at 968; *Higgins* v. *Board of Education of Grand Rapids*, *supra*, 508 F.2d at 788. Since *Austin*, only one case, decided less than two months after the Supreme Court's 1979 *Columbus* and *Dayton* school desegregation decisions, has reaffirmed the principles enunciated in *Arthur* and *Oliver*. *See Reed* v. *Rhodes*, 607 F.2d 714, 730 (6th Cir. 1979), *cert. denied*, 445 U.S. 935 (1980). In *Reed*, however, the court's finding of segregative intent was based not simply on the school board's adherence to a neighborhood school student assignment policy despite the existence of public housing discrimination, but on the school board's willing and repeated construction of schools to service public housing projects which the board knew from the outset would be racially identifiable. *Id.* at 729-30; *see also Oliver* v. *Kalamazoo Board of Education*, *supra*, 368 F.Supp. at 171-72 (school board's cooperation with real estate developers in constructing school for private housing development in previously undeveloped area of city constituted intentional promotion and creation of residential and school segregation). If any trend in the law can be discerned, it consists of an increasing focus on whether some meaningful connection exists between the policies of public housing officials and the policies of school board officials. *See Reed* v. *Rhodes*, *supra*; *Bronson* v. *Board of Education*, *supra*, 578 F.Supp. at

1104-05; *Brody-Jones* v. *Macchiarola, supra,* 503 F.Supp. at 1236-37 n.27 (absence of findings regarding governmental housing practices "does not preclude consideration of the extent to which defendant school officials by their actions and inaction may deliberately have sought to build upon and enhance the effects of existing residential segregation").

A number of factors convince us that the existence of subsidized housing discrimination in Yonkers must be accorded legal relevance in determining whether school authorities may be held legally accountable for the segregation of Yonkers public schools. Of primary significance is the fact that the City has been found liable, under relevant legal standards, for intentionally maintaining and exacerbating racial segregation in Yonkers. This determination reflects the fact that a state actor in Yonkers has been found to have unlawfully contributed to a condition of racial segregation in the community's housing, with a segregative impact on its public schools, while another state actor in Yonkers has largely failed to alleviate (and in some ways has exacerbated) the racial segregation of that same community's schools. It is undisputable that a hypothetical single state agency which controls the operation of, and engages in the racial segregation of, both housing and schools — by confining for racial reasons the city's subsidized housing to one section of the city, while simultaneously adhering to a neighborhood school policy of student assignment — can be held liable for such conduct. It is inconceivable that state action may be fractionalized such that two state agencies could be permitted to collectively engage in precisely the same conduct, yet avoid legal accountability for the identical result. It is this principle which we believe underlies the earlier cases involving the relevance of public housing segregation to school board liability: where school officials knowningly adhere to a segregative student assignment policy which is consistent with city officials' unlawfully segregative conduct in housing, such a policy cannot, as a legal matter, be considered race-neutral. To hold otherwise would advance no significant constitutional princi-

ple of equality or non-discrimination, and would simply lend credence to a legal doctrine which permitted school segregation to withstand constitutional scrutiny solely by virtue of the two-pronged nature of the state action which intentionally contributed to, perpetuated, and enhanced this condition.

The relevance of subsidized housing discrimination in Yonkers to school board liability is highlighted by the process by which school segregation was effectively insured. Even acknowledging that the Board and City are separate actors under state law, the manner in which mayoral appointments to the Board were made in Yonkers rendered this legal separation an artificial and constitutionally insignificant one. These appointments not only reflected a pattern of decisionmaking by a municipal authority consistent with the discriminatory practices of other municipal officials; through these appointments, the City and Board also created a consistency between housing and school policies which the Board had previously resisted. The record also persuasively undermines any argument that this consistency between the City's confinement of subsidized housing to Southwest Yonkers and the school board's failure to implement any significant desegregative school reforms was coincidental; rather, the combination of the City's housing policies, the mayoral appointment of Board members and the subsequent inaction of the Board amounted to an interrelated governmental effort to preserve the integrity of "neighborhood schools" whose racial segregation was governmentally sanctioned and steadfastly maintained. In our view, liability for school segregation cannot properly rest on artificial distinctions between "City" and "Board" conduct which do not reflect the practical interrelationship between the policies of these state actors. Where a city official exercises power over school board appointments as a means of furthering the city's segregative objectives and discouraging comprehensive reform, it would be anomalous to hold simultaneously that a school board's effectuation of these objectives is irrelevant in determining its liability for resulting school segregation.

The Board's failure to act is also not merely an unadorned "omission" which alone cannot ordinarily support a finding of unlawful segregation. *Cf. Hart* v. *Community School Board, supra,* 512 F.2d at 48 ("We assume that mere inaction, without any affirmative action by the school authorities, allowing a racially imbalanced school to continue, would amount only to *de facto* rather than *de jure* segregation."). Apart from the Board's other acts and omissions which perpetuated racial segregation in various aspects of the school district's operation, the Board's failure to adopt Phase II[161] or any other substitute or alternative plan was a failure to act emanating from a pattern of mayoral appointments of Board members who would be considerably less inclined to act to undo the segregative impact of prior housing and school policies. The Board's conscious neglect of the racial imbalance of the Yonkers public schools was thus not an isolated, race-neutral failure to alleviate segregation, but instead solidified the segregative impact of the official acts and omissions of housing and school authorities preceding it.

The interconnection between mayoral appointments to the Board and the Board's subsequent failure to remedy the racial imbalance in the schools is made strikingly apparent by comparing the Board's conduct prior and subsequent to the district's most

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[161]Our conclusions with respect to the Board's failure to adopt Phase II are not inconsistent with cases holding that no constitutional duty exists to transport students in order to achieve school desegregation. *See Keyes* v. *School District No. 1, supra,* 413 U.S. at 242 (Powell,J., concurring in part and dissenting in part); *Deal* v. *Cincinnati Board of Education, supra,* 369 F.2d at 61. First, these cases hold that school boards are not required to bus students *solely* to alleviate racial imbalance. *See Keyes* v. *School District No. 1, supra,* 413 U.S. at 242; *Deal* v. *Cincinnati Board of Education, supra,* 369 F.2d at 61. While Phase II was primarily intended for this purpose, fiscal, utilization-related, and educational aspects of the Plan were also present. Second, our decision is not predicated solely on the Board's rejection of Phase II; it is based both on the failure to implement Phase II, any desegregative component of Phase II, or any desegretative alternative to Phase II, as well as on the circumstances which led to the racial imbalance in Yonkers public schools prior to the development of Phase II.

concerted examination and consideration of the problem of school segregation. Prior to Mayor Martinelli's complete replacement of incumbent Board members in 1978, school officials had rejected, ignored or resisted virtually all of the City's frequently segregative initiatives: the request to reconsider the closing of School 1; the site selection for the new Yonkers High School; changes in plans for the construction of School 10; proposed attendance zone boundary changes during the mid-1970's; the proposed conversion of the school system to a K-8, 9-12 grade structure. As Mayor Martinelli appointed new members to the Board, school district affairs gradually became increasingly more in tune with the City's own objectives: the tabling of a school board resolution to return closed school facilities to the City; the rejection of Phase II; the failure to implement any alternative proposal for alleviating the racial imbalance of the schools. The Board's refusal to take steps to desegregate the schools not only reflected the opposition of a community which had for years played a similar role in causing and sustaining the City's discriminatory housing practices, but also was consistent with the Mayor's acknowledged preference for neighborhood schools, whose segregated condition had been maintained and exacerbated by such practices. In these circumstances, we conclude that it is reasonable and proper to hold the Board jointly liable with the City for perpetuating the racial imbalance of Yonkers public schools.

The Board's reliance on its neighborhood school policy cannot properly immunize its resulting perpetuation of racial segregation in Yonkers public schools. The Board's increasingly rigid adherence to the policy is inconsistent with both racial and non-racial considerations. Prior to the 1960's, the concept of neighborhood schools did not preclude substantial crosstown or out-of-neighborhood assignment of students, not only on the secondary school level but also on the elementary school level (the most notable examples being the segregative reassignment of white students from Schools 1 and 25 to virtually all-white Northwest Yonkers schools). The more steadfast application of

the policy has instead paralleled the increased development of subsidized housing in Southwest Yonkers and has persisted despite the fact that relative school utilization, fiscal instability, and disparities in educational opportunity, in addition to racial imbalance, would have been expected to lead to at least some significant alteration of student assignment patterns. The policy also did not preclude the district from assigning Special Education students in a manner entirely inconsistent with neighborhood schooling, *see Armstrong* v. *Brennan*, *supra*, 539 F.2d at 636-37, and was of considerably less import on the secondary school level. And as noted above, the existence of intentional housing discrimination which contributed to the confinement of minorities to Southwest Yonkers, together with the Board's application of an educational philosophy consistent with this practice, detracts significantly from the claim of race-neutrality.[162]

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[162]Both *Bell* and the *Austin* concurrence expressed reservations regarding the relevance of public housing discrimination to school board liability based on the remedial difficulties in holding otherwise. In *Bell*, however, the court expressed concern regarding the manner in which school authorities "would go about remedying this problem or what kind of order a federal court could enter that might as a practical matter have a chance of changing the fact that black and white families live in separate neighborhoods." 683 F.2d at 968. *Bell* thus emphasizes the importance of the City's presence in the instant case: remedial measures for the City's housing discrimination will indeed be designed to alleviate residential segregation in the city, and the development of school-related remedial measures in conjunction with such relief is certainly a realistic task. *Cf. United States* v. *Board of School Commissioners of Indianapolis, supra; Arthur* v. *Nyquist, supra.* In *Austin*, the concurring opinion's reservations were expressed in the context of its discussion of the overbroad nature of the remedial measures ordered by the lower court. 429 U.S. at 994. While we are fully mindful of the carefully circumscribed authority of federal courts to order relief for unlawful school segregation commensurate with the constitutional violation, we do not believe that our determination that the school board unlawfully failed to alleviate school segregation is inherently not susceptible to appropriate remedial action. Neither *Bell* nor *Austin* involve a judicial determination that city authorities had engaged in unlawful housing *and* school segregation. In any event, we deal here only with questions of liability; the nature and scope of any remedial action awaits the further stages of this litigation.

The Board's recognition that "white flight" from the public schools was a likely consequence of Phase II's adoption, even if accurate, is not a legally acceptable explanation for its actions and omissions. White flight may in certain circumstances be a proper consideration in devising and implementing a volunatry desegregation plan. *See Parent Association of Andrew Jackson High School* v. *Ambach*, *supra*, 598 F.2d at 719-20; *Higgins* v. *Board of Education of Grand Rapids*, *supra*, 508 F.2d at 784. Yet the Board's refusal to adopt Phase II or to give serious consideration, either prior to or subsequent to Phase II, to any other significant desegregation proposal, belies any legitimate consideration of such consequences as an explanation for its inaction. The Board's refusal to implement Phase II of any alternative plan resulted in the perpetuation of racial imbalance and educational inequalities of which the Board was long aware and had only begun to confront in any meaningful fashion at the time of the 1976 fiscal crisis. While the late 1960's and early 1970's were marked by some efforts to alleviate the increasing racial imbalance in the schools, the segregative decisions made both at that time and afterward suggest that the white flight concern was advanced primarily in order to justify or explain the district's deliberate perpetuation of segregation rather than as a legitimate consideration in devising means by which to more effectively promote desegregation. *See id.* at 720; *Brody-Jones* v. *Macchiarola*, *supra*, 503 F.Supp. at 1242. The possibility of white flight cannot be invoked in an effort to avoid or abandon efforts to desegregate schools whose racial imbalance is the result of prior unlawful acts. *See Hart* v. *Community School Board*, *supra*, 383 F.Supp. at 742-43. We find its invocation equally untenable here, where the Board's own prior acts and omissions — its assignment of minority Special Education students to predominantly white schools, its assignment of minority staff to predominantly minority schools, the continued disparities in educational opportunity at identifiably minority and white schools, and the rejection of the NYU Report proposals — served to foster and encourage such attitudes. *See Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 929.

Based on all of the above considerations, we hold that the Board's failure to implement measures for alleviating systemwide school segregation, in the context of the totality of all of its actions and omissions, is sufficient to render it legally responsible for the perpetuation of racial segregation in Yonkers public schools. All significant plans to effectuate systemwide desegregative school reorganizations and/or equalize educational opportunities in Yonkers met with disapproval or resistance: the efforts of state education authorities in the early 1970's; the 1972 NYU Report proposals; the 1976-77 Task Force recommendations; the 1977 Phase II plan. Although the district was not without desegregative initiatives — for example, the planned opening of School 10 and King, and school closings in 1976 which resulted in the elimination of a number of racially isolated schools and the reassignment of some students in a desegregative manner (to Schools 13, 27, 31, Emerson and Burroughs) — even these measures were recognized merely as initial steps toward a more comprehensive alleviation of racial imbalance in Yonkers public schools. The Board's failure to implement any such plan, its knowing perpetuation of inequalities in educational opportunity, and its other acts of intentional discrimination, were consistent with the principal segregative motive underlying the City's housing policies and practices: the general confinement of minorities to Southwest Yonkers.

The Board has likewise failed to satisfactorily establish that its segregative acts and omissions would have occurred "even if" racial considerations had been ignored. Indeed, certain features of school district operations, such as the steering of minorities, the Special Education program, and the assignment of teachers and administrative personnel, would certainly have been different had racial factors not played the primary role which they actually did. At least some of the inequalities in educational opportunity discussed in our findings would surely have been remedied (or remedied more quickly) had desegregation not been one of the likely consequences of such action. To the extent the Board's

persistent refusal to implement desegregative reorganization plans can even be evaluated on an "even if" basis, we are persuaded that, as with the City's consistently segregative subsidized housing site selections, a different pattern of decisionmaking would have occurred had the Board's awareness of and responsiveness to racially influenced community opposition not been present.

In conclusion, we hold that the Board is liable for the racial segregation of Yonkers public schools.

2. *The City*

The liability of a municipal entity for the racial segregation of a state-created school system turns on the resolution of two questions: first, whether such an entity may ever by subject to such liability; and second, under what circumstances such liability may be imposed.

The Second Circuit's decision in *Arthur* v. *Nyquist* answers the first question in the affirmative and sheds light on the second. In *Arthur*, the district court held the City of Buffalo's Common Council liable for the racial segregation of the Buffalo public schools based on the Common Council's opposition to school integration and its role in causing and maintaining segregated housing conditions. As for its opposition to school integration, the court found that the Common Council had demonstrated its segregative intent in three ways. First, the Council adopted an ordinance barring the use of portable classrooms after the Board had agreed to purchase them in an effort to increase the capacity of white schools and thereafter reassign minority students to these schools. Second, the Council refused to provide funds for the implementation of a desegregative middle school program developed by the Board. Third, the Council insisted on limiting the number of blacks at a high school whose acquisition from the city's Catholic Diocese was under consideration by the Council. 415 F.Supp. at 953-55. The court also found that the Common Council and city housing authorities had helped cause or maintain residential segregation through its urban renewal program, in

which dislocated black families were relocated in a geographically limited, minority populated area of the city. The court held that the Common Council's segregative conduct with respect to housing constituted a separate and independent ground for holding it liable for the segregation of the Buffalo public schools. *Id.* at 969.

The Court of Appeals affirmed the district court's determination of municipal liability solely on the ground that the Common Council "aided the Board [in resisting the State's order to integrate] by systematically denying funding to programs which would have encouraged integration." 573 F.2d at 145. The court did not examine the other school-related bases for the Common Council's liability and expressly declined to reach the issue of the relevance of the municipality's role in furthering housing segregation. *Id.* at 145 & n.22. Thus, although the holdings of the district court and the Court of Appeals differ with respect to the circumstances under which a municipal entity may be held liable for school segregation, both decisions recognize that a city may be held liable for the racial segregation of state-created public schools.

In support of its argument that the City is not a proper defendant in the school desegregation portion of this case, the City cites *Greenhouse* v. *Greco*, 617 F.2d 408 (5th Cir. 1980), and *United Black Firefighters of Norfolk* v. *Hirst*, 604 F.2d 844 (4th Cir. 1979), for the proposition that the City's mere exercise of political influence over the Board is insufficient to render it liable for the segregation of the Yonkers public schools.

In *Greenhouse*, the Fifth Circuit held that the district court did not abuse its discretion by dismissing the Diocese of Alexandria (a church district encompassing twenty-nine counties of the State of Louisiana) and the diocesan bishop and school superintendent from a parochial school desegregation case. Significant differences exist, however, between the church district in *Greenhouse* and the City of Yonkers and their respective relationships with the school systems at issue in each case. The diocese and

bishop had no legal relationship with or legal authority over any of the church corporations which, like the Yonkers Board of Education, were directly responsible for the operation of the diocesan parochial schools. Thus, "[a]ny and all assistance rendered to each school by the Bishop and/or the Diocese [wa]s entirely voluntary", and each church corporation was "subject to the bishop's authority only by virtue of religious obedience to canon law." *Id.* at 411, 414. According to the court,

> The weight wielded by the bishop consists of moral persuasion backed by possible religious sanctions. He simply does not have the legal power traditionally found in civil government, nor does he have the legal standing to carry out any integration decrees which may eventually be issued by a federal court. It is apparent that only the individual church corporations may respond in this regard.

Id. at 414 (footnote deleted). In Yonkers, the legal relationship between the City and Board is significantly different. Despite their legal autonomy under state law, the City is legally responsible for allocating funds to the school district, for appointing school board members, and for retaining legal title to property designated for educational use. More importantly, the City may indeed be called upon to respond to school desegregation decrees issued by a federal court. *See Arthur* v. *Nyquist*, 712 F.2d 809 (2d Cir. 1983) (ordering city to appropriate additional funds to school board to enable board to implement school desegregation plan), *cert. denied*, 104 S.Ct. 1907 (1984); *see also United States* v. *Board of School Commissioners of Indianapolis*, *supra* (restraining city housing authority from developing public housing projects in city as part of interdistrict school desegregation remedy). Finally, the City's capacity to significantly affect the racial composition of the City of Yonkers and the Yonkers public schools by virtue of its subsidized housing policies and practices and its involvement in school-related affairs far exceeds the practical capacity of the diocesan defendants in *Greenhouse* to have similarly affected the racial composition of the diocesan parochial schools. Thus, the

concerns expressed by the Fifth Circuit in *Greenhouse* are simply not apposite in determining the liability *vel non* of the City of Yonkers in this case.

Hirst is more easily distinguished. In *Hirst*, an employment discrimination case brought by city fire department employees against various city departments and officials, the court dismissed plaintiffs' claim against the mayor and the City Council based on the absence of any allegation that these defendants could "control, or interfere with, the employment practices of the police department." 604 F.2d at 846. The court also noted that plaintiffs' "assertion that the City Council creates laws affecting the Fire Department with no statement of how any such action discriminated against the plaintiffs" was insufficient to state a claim under the applicable civil rights statutes. *Id.* Not only are such allegations present in the instant case, but the evidence itself convincingly establishes both City involvement in school affairs and intentionally discriminatory conduct affecting both housing and schools. The allegations and evidence in this case thus establish far more than the mere exercise of political influence over the Board which the City contends is insufficient to render it liable for the segregation of Yonkers public schools.

In sum, we conclude that the City of Yonkers is a proper party to the school desegregation portion of this case and may be held liable for the racial segregation of Yonkers public schools. *See Arthur* v. *Nyquist*, *supra*; *see also United States* v. *Board of School Commissioners of Indianapolis*, *supra*. This conclusion is fully consistent with the decisions of the district and circuit court in *Arthur* v. *Nyquist*, with the reasons stated in our discussion of jurisdiction over the claims asserted against the City, *see* SCHOOLS VI.A.2 *supra*, and, as noted below, with Supreme Court decisions involving school desegregation.[163] We thus turn to the second question posed earlier: under what circumstances

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[163]The impact of the Supreme Court's school desegregation precedents on both of the questions posed above is discussed at pages 512a-13a *infra*.

may a municipal entity be held liable for the segregation of public schools.

As noted above, the Court of Appeals in *Arthur* v. *Nyquist* relied solely on the Buffalo Common Council's budget-related conduct in upholding its liability for the segregation of the Buffalo public schools, without discussing or expressly declining to determine the relevance of other forms of municipal activity to the liability determination. This conclusion, however, is only the beginning of our inquiry. While the Court of Appeals relied only on the Common Council's budget-related conduct in holding it liable for the segregation of the Buffalo public schools, we do not read its decision as precluding reliance on other forms of municipal conduct, including but not limited to those discussed by the district court, which also demonstrate an intent to cause or maintain school segregation. Just as a school board can effectuate school segregation through a variety of methods, so too can a city exhibit segregative intent and cause segregation in its schools in a variety of ways. We see little reason to restrict the scope of our inquiry to budgetary matters without also examining whether the City's other actions and omissions involving housing, Board appointments, school site selection, and other involvement in school affairs were characterized by the segregative intent, and achieved the segregative result, proscribed by the Court of Appeals in *Arthur*.

The relevance of a municipal entity's discriminatory housing policies or practices to school segregation has been explored in another context. In *United States* v. *Board of School Commissioners of Indianapolis*, 573 F.2d 400 (7th Cir.), *cert. denied*, 439 U.S. 824 (1978), the Seventh Circuit held that the discriminatory housing practices of a municipal housing authority could provide a basis for ordering interdistrict relief for school segregation. The court recognized that segregative housing practices are causally related to school segregation, and that Justice Stewart's concurring opinion in *Milliken* v. *Bradley*, 418 U.S. 717 (1974), and the

district court's decision in *Evans* v. *Buchanan*, 393 F.Supp. 428 (D.Del.), *aff'd mem.*, 423 U.S. 963 (1975), both supported the imposition of an interdistrict school desegregation remedy where governmental authorities had engaged in segregative public housing practices. The court concluded that the Housing Authority of the City of Indianapolis' policy of confining public housing projects within the boundaries of the Indianapolis Public School District, if found to be discriminatory in intent and segregative in its interdistrict effect, would support the implementation of an interdistrict school desegregation remedy involving the City of Indianapolis and its surrounding suburban school districts. *Id.* at 408-10. On remand, the district court found that discriminatory intent existed, and as part of its interdistrict remedy, ordered the housing authority to refrain from developing any new low-rent public housing projects within the boundaries of the Indianapolis school district. 456 F.Supp. 183, 192 (S.D.Ind. 1978); 419 F.Supp. 180, 186 (S.D.Ind. 1975). The Seventh Circuit upheld these findings and approved the relevant aspects of the district court's interdistrict remedy. 637 F.2d 1101, 1108-11, 1114, 1117 (7th Cir.), *cert. denied*, 449 U.S. 838 (1980).

The *Indianapolis* litigation is obviously not dispositive of the issue before this Court: it deals only with the predicate for imposing interdistrict relief for school segregation and thus neither authorizes nor precludes the imposition of municipal liability and the fashioning of "school-specific" relief[164] for the segregation of a city's public schools. Nevertheless, the *Indianap-*

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[164]By "school-specific" relief, we refer to remedial measures other than those dealing solely with the City's construction, development or location of subsidized housing; for example, ordering the City to fund the cost of implementing a desegregation decree involving the implementation of desegregative educational programs. *See Arthur* v. *Nyquist*, *supra*, 712 F.2d at 813. In the *Indianapolis* litigation, the cost of implementing the interdistrict school desegregation plan was borne entirely by the state. 677 F.2d 1185 (7th Cir.), *cert. denied*, 459 U.S. 1086 (1982). The issue of allocating the cost of remedying racial segregation within the Indianapolis school district was not before the court. *Id.* at 1186 n.1, 1188 n.3.

olis litigation is relevant insofar as it recognizes the causal relationship between a city's housing practices and their impact on the city's schools, and supports the conclusion that city housing authorities can be held legally accountable in a school desegregation suit for discriminatory housing practices which contribute to the segregation of schools. The ordering of purely housing-related relief against the Indianapolis city housing authorities is consistent with the general principle of fashioning a remedy which is commensurate with the nature and extent of the violation; since the city's only involvement in causing or maintaining segregated schools was through its unlawful public housing practices, the remedy ordered consisted only of prohibitions against the continuation of such practices. This issue of remedy, however, does little to undermine the support for the principle of holding a city responsible for the school-related consequences of its segregative public housing practices. In the instant case, where the inquiry is purely *intra*district in scope, the reliance on unlawful municipal housing practices as a basis for assigning legal responsibility for school segregation is certainly no less appropriate than in *Indianapolis*. We conclude that the *Indianapolis* litigation and the district court's decision in *Arthur* both support the relevance of a city's segregative public housing practices in determining whether the city may properly be held liable for the segregation of the city's public schools.

While the Supreme Court has not addressed either the question of whether a city may ever be held liable for segregation in schools or the relevance of a city's housing or other practices to such a determination, we believe that the principles enumerated in *Indianapolis* and *Arthur* are consistent with the Supreme Court's school desegregation precedents. In *Swann* v. *Charlotte-Mecklenburg Board of Education*, the Supreme Court cautioned against using school desegregation cases "to achieve broader purposes lying beyond the jurisdiction of school authorities." 402 U.S. at 22. In *Austin Independent School District* v. *United States*, three Justices, concurring in the remand of a school desegregation

suit for reconsideration in light of *Washington* v. *Davis*, noted in a similar vein that the principal cause of school segregation is racially imbalanced residential patterns and that "discrimination in housing — whether public or private — cannot be attributed to school authorities." 429 U.S. at 994. Neither case, however, intimates that a *city* cannot be held liable where its *own* intentionally segregative housing practices result in the segregation of schools. In *Swann*, the Court specifically declined to resolve the issue of "whether a showing that school segregation is a consequence of other types of state action, without any discriminatory action by school authorities, is a constitutional violation requiring remedial action by a school desegregation decree," *id.* at 23, thus leaving open the question not only of school board liability for the intentional discriminatory acts and omissions of others, but also of city liability for school segregation caused by the city's own intentionally discriminatory conduct. And in *Austin*, the concurring opinion spoke only of the liability of school authorities for the discriminatory housing policies of others; once again, the Court did not address the liability of governmental bodies, city or school, for their *own* discriminatory conduct. Indeed, if any trend can be discerned from the Court's school desegregation cases, it is that the discriminatory practices of governmental housing authorities may, in certain circumstances, be relevant to a determination of the causes of and remedies for school segregation. *See Evans* v. *Buchanan*, 423 U.S. 963 (1975), *summarily aff'g* 393 F.Supp. 428 (D.Del. 1975); *Milliken* v. *Bradley*, *supra*, 418 U.S. at 755 (Stewart,J., concurring). The Supreme Court's school desegregation cases thus do not at all evince disapproval of, and indeed tend to support, holding municipal authorities liable when such authorities, by their own conduct, have intentionally contributed to the racial segregation of state-created public schools. These decisions also are consistent with the conclusion that a city's housing practices are relevant in making this determination.

We need not decide whether the district court's alternative holding in *Arthur* — that a city's discriminatory housing practices

alone form an independent basis for a finding of city liability for school segregation — is a correct statement of the law regarding school segregation.[165] We believe that the housing-related practices of City authorities, along with the various other methods by which City officials have influenced school district operations and thereby contributed to its racial segregation, are all relevant in determining whether the City's acts and omissions as a whole have resulted in the intentional creation or aggravation of racial segregation in the Yonkers public schools. The Supreme Court's school desegregation decisions have one common guiding principle: where governmental authorities, through various acts and omissions, intentionally create or maintain racially segregated schools, such authorities may be held legally responsible for correcting this condition. In our view, these principles of intentional state action, causation and segregative impact, rather than the artificial fragmentation of responsibility for public schools based on state-created legal subdivisions of governmental authority, are more constitutionally relevant criteria for assessing the liability of city authorities for the segregated condition of the public schools located within their borders. The conduct of the City is no less "state action" than the conduct of the Board. We thus reject the contention that the Board's state-delegated responsibility for the operation of the Yonkers public schools somehow shields other governmental authorities from being held legally accountable when such authorities engage in intentionally segregative conduct with respect to these schools.

In this case, the City's housing practices are an important part of its overall intentionally segregative conduct. The City's confinement of subsidized housing virtually exclusively to South-

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[165]Similarly, we need not resolve the question whether the City's involvement in, and indirect control over, the operation of Yonkers public schools constituted a degree of control which renders the City "equally culpable with school officials for the actual operation of the [school] system," *see* NAACP Proposed Findings of Fact and Conclusions of Law, at 41, or is otherwise an independent basis for imputing liability for school segregation to the City.

west Yonkers not only violated Title VIII and the equal protection clause but also had a clear impact on Yonkers public schools. The persistent and deliberate refusal to develop subsidized housing outside of Southwest Yonkers had clearly segregative consequences not only for residential conditions in the city; in light of the school district's historic neighborhood school policy, the perpetuation and exacerbation of racial imbalance in the school district was a natural, probable and actually foreseen consequence of the City's discriminatory housing practices as well. *See Columbus Board of Education* v. *Penick*, *supra*, 443 U.S. at 464-65. Indeed, the unavoidable realization that opposition to a more geographically dispersed distribution of subsidized housing was related in part to the impact of such a housing policy on the community's schools, together with the City's own attempts to alter school attendance zone boundaries in a segregative manner, support our conclusion that the City's segregative intent was not limited to residential patterns in Yonkers. Just as a school board's alteration of attendance zone boundaries in a segregative manner may support a finding of intentional segregation of schools, *see id.* at 462; *Reed* v. *Rhodes*, *supra*, 607 F.2d at 734; *NAACP* v. *Lansing Board of Education*, *supra*, 559 F.2d at 1049-51, similar proposals by City officials, especially when clearly based on racial considerations, also are probative of segregative intent. We recognize that the Board had sole legal authority to implement student reassignments or educational programs designed to reduce the racial segregation of the public schools and thus ameliorate the segregative impact of the City's housing practices. Yet the Board's failure to do so, as well as its other segregative acts and omissions, do not properly relieve the City from legal responsibility for the fact that its own discriminatory housing practices contributed substantially to the systemwide perpetuation and exacerbation of racial segregation in both housing and schools. *Cf. Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 969. The City's housing practices provide a strong basis for holding the City legally

responsible for the racial segregation of the Yonkers public schools.

Although the geographic proximity of the Riverview project and School 10 provides a visually unambiguous example of the interrelationship between housing and schools, the basis for the City's liability for the segregation of School 10 and surrounding schools is no different than the basis for its liability for school segregation systemwide. Unlike the Board's opening of School 10, one of only two elementary schools opened by the Board since 1965, Riverview represented for the City one segment of a consistent and longstanding pattern of segregative subsidized housing development in Yonkers. And unlike the intent of the Board, for which the planning of School 10 represented part of a series of initial efforts to remedy racial imbalance in Southwest Yonkers schools, the City's development of Riverview, along with other subsidized housing projects planned contemporaneously with it, represented the most concentrated portion of a pattern of subsidized housing development which was motivated at least in part by an intent to exclude minorities from East and Northwest Yonkers. Thus, regardless of whether some City officials may have at one time shared the Board's optimistic expectation that School 10 itself would be racially integrated, the City's conduct with respect to Riverview and School 10 can be viewed properly only as part of prior, contemporaneous, and subsequent housing practices which intentionally preserved racial segregation throughout the City as a whole.

The mayoral appointment of Board members is also relevant evidence of overall municipal intent to maintain the racial segregation of Yonkers public schools. The relevance of such conduct was implicitly acknowledged in *Arthur*, in which the district court examined a mayoral appointment to the Buffalo Board of Education but concluded that the appointment of a single opponent of busing was insufficient evidence of discriminatory intent. *Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 959; *cf. United States* v. *City of*

Birmingham, 538 F.Supp. 819, 826 (E.D.Mich. 1982) (recall of City Commissioners who supported proposed integrated low-income housing project and appointment of replacements by City Commissioners who opposed the project constitutes evidence of city's discriminatory intent in interfering with development of housing project), *aff'd*, 727 F.2d 560, 564-65 (6th Cir.), *cert. denied*, 105 S.Ct. 95 (1984). As noted previously, we find that the mayoral pattern of Board appointments — the failure to reappoint Board members known for their commitment to school desegregation, the appointment and reappointment of individuals in a manner consistent with the Mayor's commitment to neighborhood schools, and the resulting perpetuation of the racial segregation which the City itself had deliberately contributed to and maintained — is sufficient in the circumstances of this case to support a finding of segregative intent with a resulting systemwide segregative impact on Yonkers public schools.

The independent legal status of the City and Board and the limited nature of the mayoral statutory appointment power does not, in our view, preclude a finding of municipal liability for school segregation based in part on mayoral appointments to the board. While a city's legal responsibility for the perpetuation of segregated schools cannot appropriately rest simply upon the imposition of vicarious liability for the independent acts and omissions of school officials who are responsible for and capable of changing this condition, to view the conduct of the Yonkers Board of Education independently of the circumstances and manner in which its members were selected would be to artificially separate city powers, policies and practices from educational affairs in a manner wholly inconsistent with the reality of public education in Yonkers. Although state law expressly provides for mayoral appointments and budgetary control, as well as the "independent" status of the Board, it in no way contemplates the deliberate perpetuation of racial segregation in housing and schools by those officials charged with the responsibility for administering these respective areas of activity. Of course, contin-

ued attempts to dominate or control Board members subsequent to their appointments might constitute additional persuasive evidence of improper motive. The absence of evidence of such occurrences in this case, however, does not diminish the relevance of the City's more subtle, yet significant, segregative influence over educational affairs. Indeed, a contrary rule would permit a municipality bent on perpetuating racial segregation to achieve immunity from federal remedial measures merely by allocating responsibilities to separate governmental agencies which nevertheless act for similar purposes. The combination of the City's segregative housing practices and mayoral appointments together have served to perpetuate racial segregation in Yonkers public schools and constitute sufficient grounds for a finding of municipal liability.

We are cognizant that this area of municipal activity, more so than any other, involves an inquiry into politically-related affairs and activities which does not easily lend itself to review by the federal judiciary. In *Mayor* v. *Educational Equality League*, 415 U.S. 605 (1974), the Supreme Court cautioned against judicial interference in the discretionary appointment processes of local elected officials. In *Mayor*, plaintiffs alleged that the Mayor of Philadelphia's predominantly white appointments to a school board nominating panel constituted a violation of the equal protection clause. Plaintiffs sought an injunction barring the most recently selected panel from submitting nominees for board membership to the Mayor, and an order directing the Mayor to appoint a panel "fairly representative of the racial composition of the school community." *Id.* at 609. The Supreme Court dismissed the claim, holding that plaintiffs' proof of racial discrimination was not sufficiently reliable. According to the Court, an ambiguous statement by the Mayor about the racial composition of the 1969 board (rather than the 1971 panel), a Deputy Mayor's unawareness of certain black organizations in the city, and racial composition percentage comparisons which were considered meaningless based on the small size of the sample and the

inappropriateness of using the population at large in making the comparisons, constituted evidence which was "too fragmentary and speculative" to support a claim of racial discrimination. *Id.* at 621. The Court also expressed its concern that "judicial oversight of discretionary appointments may interfere with the ability of an elected official to respond to the mandate of his constituency" and that such oversight raised "delicate issues of federal-state relationships . . . made particularly complex by the interplay of the Equal Protection Clause of the Fourteenth Amendment, with its special regard for the status of the rights of minority groups and for the role of the Federal Government in protecting those rights." *Id.* at 615; *see also James* v. *Wallace*, 530 F.2d 963 (5th Cir. 1976) (rejecting claim of discriminatory appointments by Governor of Alabama to state boards and commissions based on inadequacy of statistical evidence and discretionary nature of appointments). Because of the absence of reliable proof of racial discrimination, the Court did not resolve these constitutional concerns. 415 U.S. at 616.

While a constitutional challenge directed solely at the mayoral appointment process would present problems similar to those raised in *Mayor* and *James*, the instant case does not rest on such grounds. We do not find that the evidence of mayoral Board appointments itself establishes a constitutional violation requiring remedial relief in the form of new appointments or changes in appointment procedures. This is not a case in which this Court is effectively asked to order the Mayor "to exercise his discretion in a particular way." 415 U.S. at 615 (*quoting Carter* v. *Jury Commission of Greene County*, 396 U.S. 320 (1970) (challenging state governor's alleged discriminatory exclusion of blacks in discretionary appointments to county jury commission)). Rather, the evidence concerning mayoral appointments to the Board is relevant and significant in this case insofar as it provides circumstantial evidence of a pattern of decisionmaking consistent with other municipal acts and omissions designed in part to perpetuate the segregated condition of housing and schools in Yonkers. To

the extent that this segregation was caused in part by housing practices influenced by racially motivated community opposition to nondiscriminatory policies of subsidized housing site selection and construction, the Mayor's responsibility for responding to the concerns of this same community cannot reasonably preclude judicial examination of mayoral appointments to the school board. Moreover, the evidentiary pitfalls inherent in drawing conclusions about the racial composition of governmental boards or commissions from statistically limited and inapposite numerical evidence of disproportionate racial impact are not present here, where the extensive testimony of witnesses, the contemporaneous statements, perceptions and impressions of city and school officials and community members, and the more recent actions of the Board which have been consistent both with the Mayor's efforts to exercise greater control over school affairs and with the City's segregative housing practices, all provide a more than adequate supply of relevant information from which conclusions regarding intent and impact may be drawn.

The task of examining the motivations or reasons underlying the conduct of state and local governmental authorities is an admittedly delicate one, particularly where the decisionmaking process involves the exercise of discretion by locally elected officials. Yet the sensitive and elusive nature of this inquiry is inherent in the multitude of school desegregation cases which federal courts have been called upon to decide over the past decade. To ignore the circumstances surrounding the mayoral appointments to the Board in this case would be to immunize from review a single but significant aspect of official decisionmaking which has collectively resulted not simply in a disproportionately low representation of minority ethnic groups on a particular governmental body, but in the city-wide racial segregation of public housing and public schools. Where discretionary mayoral appointments are neither examined in isolation nor challenged as impermissible in and of themselves, but are one aspect of an overall pattern of consistently segregative conduct occurring over

several decades, the arguments for federal judicial noninterference in determining the causes and consequences of this exercise of official decisionmaking power become increasingly untenable. We conclude that an examination of the manner in which Board appointments were made in Yonkers is appropriate under the circumstances described above and that such appointments, along with other segregative practices of the City and other evidence of involvement in educational affairs, constitute a sufficient basis for holding the City legally responsible for the racial segregation of Yonkers public schools.[166]

Not all of the City's school-related conduct was segregative in its ultimate impact. Indeed, the legal relationships which gave the City its most direct control over school affairs were generally not accompanied by racially segregative consequences to Yonkers public schools. The City's involvement in the site selection for Yonkers High School and Saunders Trades and Technical High School, while illustrative of the City's somewhat successful efforts to influence school district decisionmaking, eventually resulted in the selection of sites which were preferred by the Board and were not racially segregative. Similarly, the City Council's budgetary

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[166]The City also contends that judicial scrutiny of mayoral appointments involves an inquiry into individual attitudes and beliefs which are protected by the first amendment and thus cannot be the basis for a finding of unlawful discrimination. This argument misperceives the relevance of mayoral appointments in this case. Our function is not to determine whether the Mayor or his appointees' personal beliefs are unlawful, or whether an act of appointment itself was a violation of the Constitution. We have instead focused on the reasons underlying the appointments, the circumstances in which the appointments were made, and the consequences of the appointments on the Yonkers school system in order to determine whether evidence concerning the mayoral appointment of Board members constitutes evidence of an intent to influence and control educational affairs in a manner consistent with other municipal conduct affecting Yonkers public schools. It is this intent, the other acts and omissions of governmental authorities which were consistent with this intent, and the resulting impact of such acts and omissions on Yonkers public schools, which together form the basis for our finding of unlawful school segregation. *See also United States* v. *Yonkers Board of Education, supra*, 518 F.Supp. at 200.

power vested the City with considerable control over educational matters; this control, however, was not actually exercised in a manner which resulted in the perpetuation of racial segregation in Yonkers public schools. *Cf. Arthur* v. *Nyquist*, *supra*, 573 F.2d at 145. Nevertheless, the City's acts and omissions need not have been uniformly segregative in order to establish its liability for the segregation for which some of its conduct is responsible. *See Arthur* v. *Nyquist*, *supra*, 415 F.Supp. at 913. Whether direct or indirect, the City's housing practices, the mayoral appointment of Board members, and other City involvement in school affairs are more than adequate evidence of the City's intentional perpetuation and exacerbation of racial segregation in Yonkers public schools. We therefore hold that the City is liable for the racial segregation of Yonkers public schools.

CONCLUSION

Having found the defendants liable, it is appropriate that the remedy phase of these proceedings be addressed.

The Court will hold a scheduling conference on December 18, 1985 at 9:45 A.M.

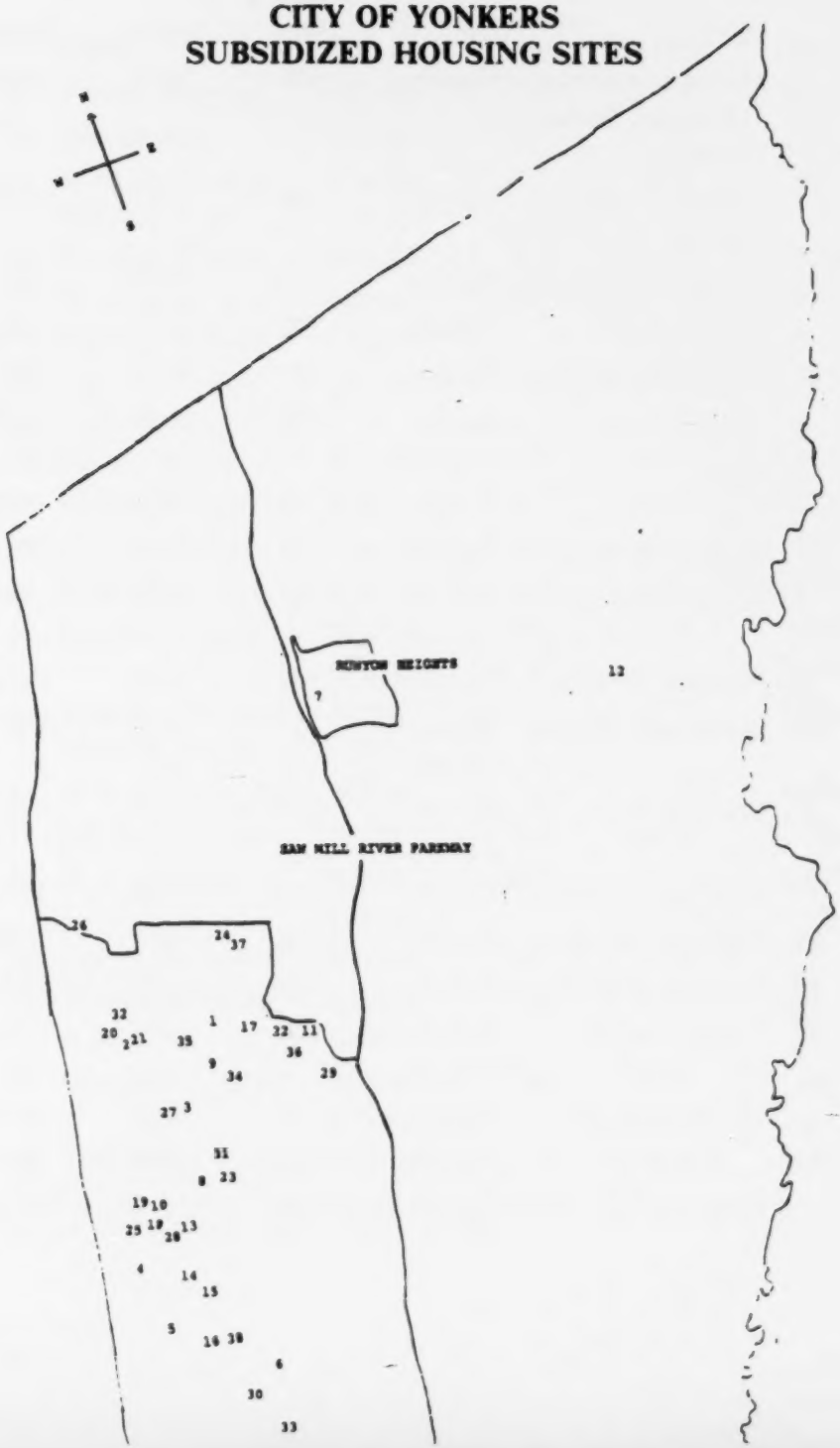
SO ORDERED.

Dated: New York, New York
November 20, 1985

(s) Leonard B. Sand
U.S.D.J.

APPENDIX A

CITY OF YONKERS SUBSIDIZED HOUSING SITES



APPENDIX A — CONT'D

	Project	Type	Number of Units	Approved	Opened
1.	Mulford Gardens (Emmett Burke Gardens)	Family	550	1938	1940
2.	Cottage Place Gardens	Family	250	1942	1949
3.	Schlobohm Houses	Family	413	1950	1953
4.	Sunset Green	Family	70	1957	1960
5.	Sunnyside Manor	Family	121	1957	1964
6.	Loehr Court	Senior Citizen	108	1958	1962
7.	Hall Court	Family	48	1958	1962
8.	Calgano Homes	Family	278	1958	1964
9.	Walsh Houses	Senior Citizen	300	1961	1967
10.	Phillipse Towers	Family	544	1962	1964
11.	Kristensen Houses	Senior Citizen	32	1963	1967
12.	Curran Court	Senior Citizen	186	1963	1967
13.	Jefferson Terrace	Family	64	1968	1971
14.	Highland Terrace	Family	96	1968	1969
15.	Messiah Baptist	Family	130	1970	1972
16.	Flynn Manor	Senior Citizen	140	1970	1971
17.	10 Orchard St.	Family	8	1970	1971
18.	Riverview I	Family	454	1970	1975
19.	Riverview II	Family	343	1970	1975

APPENDIX A — CONT'D

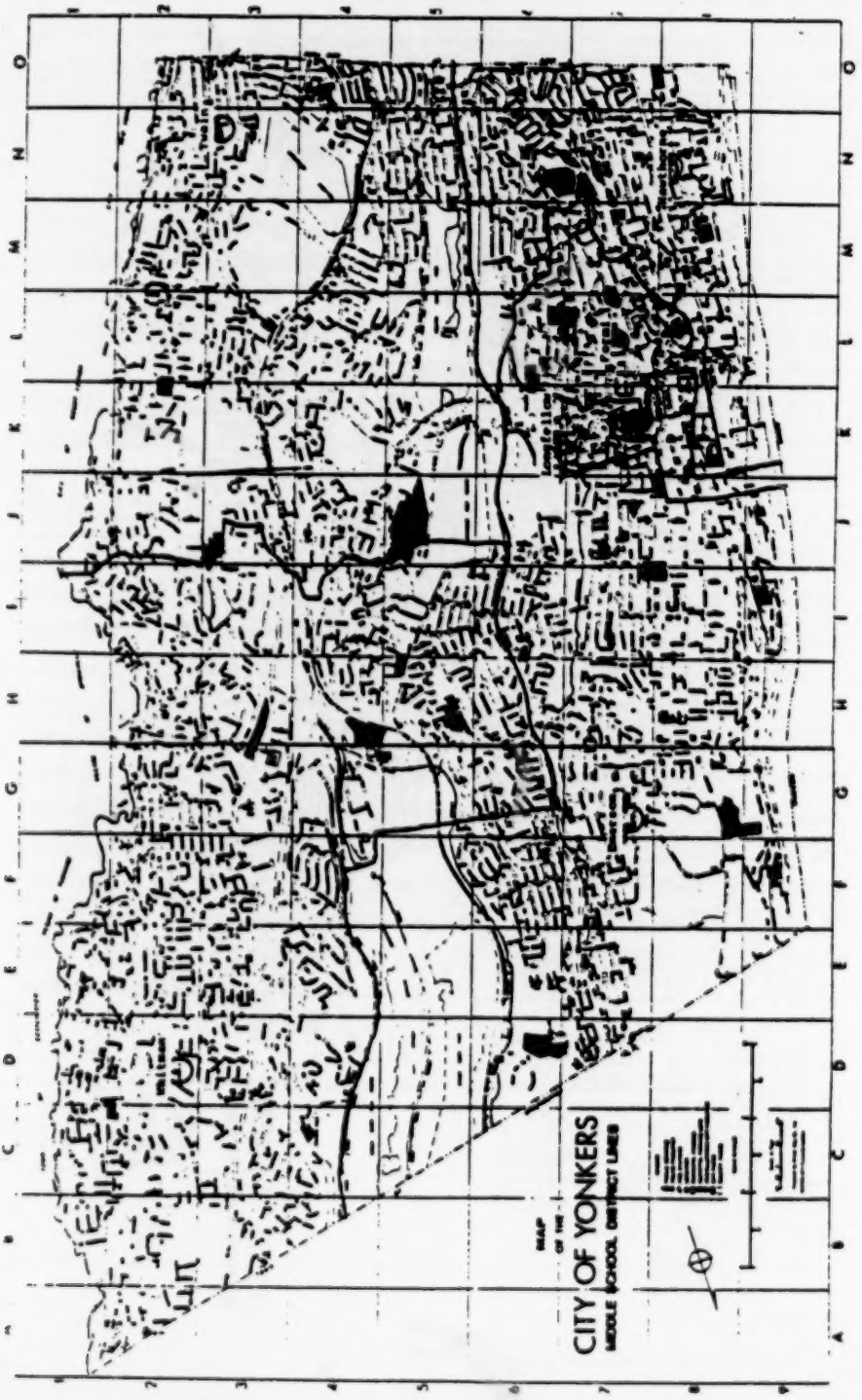
	Project	Type	Number of Units	Approved	Opened
20.	Frazier Homes	Family	21	1970	1973
21.	The Dorado	Family	188	1970	1973
22.	Whitney Young Manor	Family	195	1970	1974
23.	Waverly Arms	Family	28	1970	1972
24.	Fr. Finian Sullivan Towers	Senior Citizen	150	1970*	1975
25.	164-170 Buena Vista Ave.	Family	12	1971	1971
26.	Seven Pines	Family	300	1971	1974
27.	Cromwell Towers	Family	317	1971	1974
28.	Jackson Terrace	Family	181	1971	1973
29.	Parkledge	Family	310	1972	1975
30.	Lane Hill Apts.	Senior Citizen	109	1976	1980
31.	Margaret Hughes Housing	Senior Citizen	101	1977	1980
32.	28 Lamartine Terr.	Mixed	82	1977	1979
33.	557 So. Broadway	Mixed	14	1977	1979
34.	St. Casimir's	Senior Citizen	264	1978	1980
35.	182 N. Broadway	Family	62	1979	1981
36.	Kubasek-Trinity Manor	Senior Citizen	130	1979	1981
37.	Monastery Manor	Senior Citizen	146	1979	1982
38.	Post Street Apts.	Family	55	1980	1981

* Preliminary approval; final approval given in October 1973.

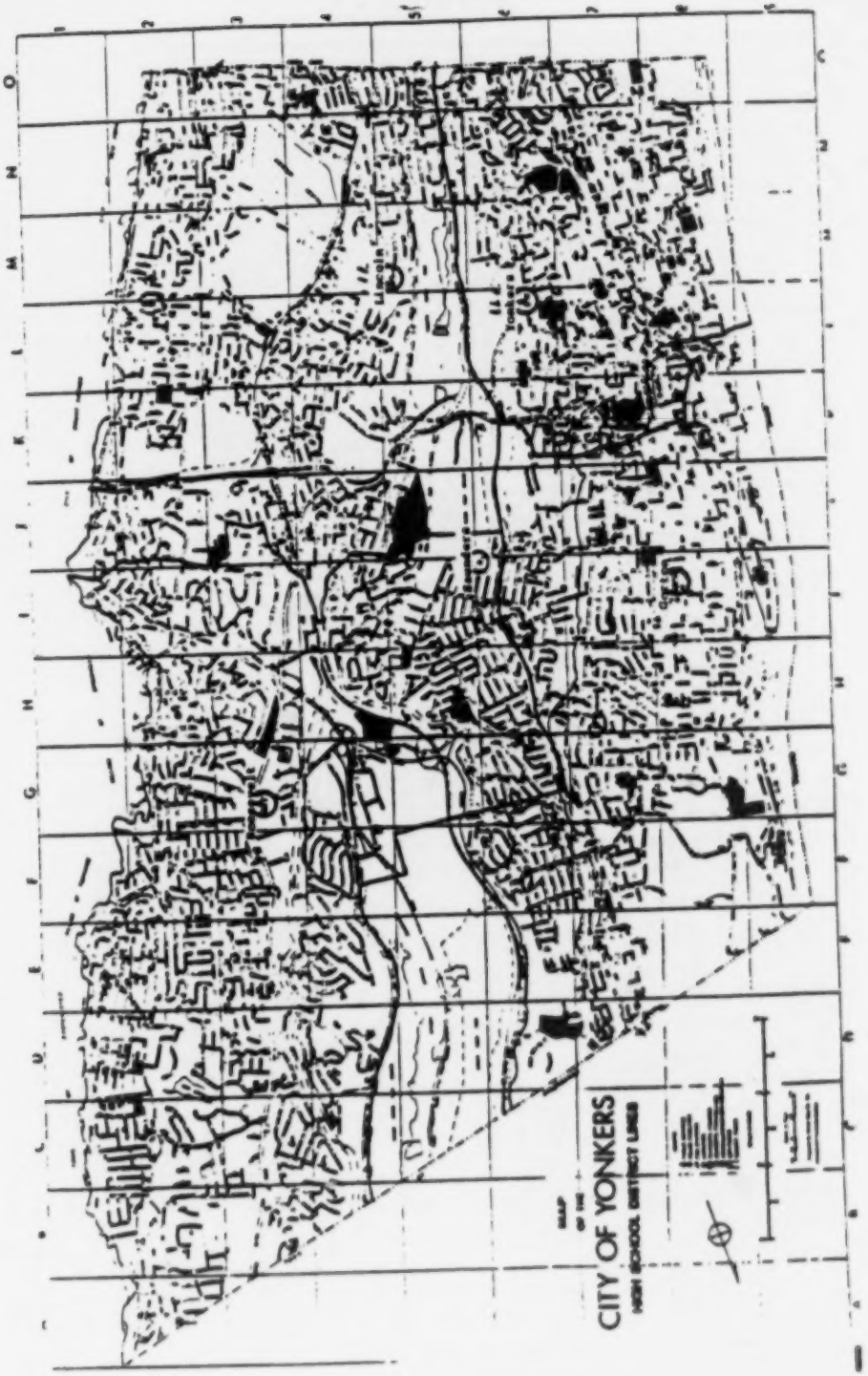
Source: GX 1225.52; 1099.9; 1099.11; C-1700.

APPENDIX B

APPENDIX C



APPENDIX D



APPENDIX E

Engineering Department figures are derived from the Board of Education's 1981 "Annual School Profiles" (GX 81) and the administration's 1977 Phase II plan (GX 98). These figures are based on the square footage of space available. GX 71; GX 98, at 14.

New York University Report figures are derived from a 1972 New York University School of Education report containing various school reorganization proposals for the Yonkers public schools. Except as otherwise noted below, elementary school capacity is based on a "realistic operating capacity" of 90% of a school's theoretical student capacity; middle school capacity is based on a "realistic operating capacity" of 80% of a school's theoretical student capacity, and high school capacity is based on a "realistic operating capacity" of 80-85% of a school's theoretical student capacity.

The 1976 School Closing Plan and 1977 Phase II figures are derived from two school reorganization plans developed by Superintendent Joseph Robitaille and his staff. Elementary school capacity figures were derived by multiplying the number of available classrooms by a 28-student-per-classroom average, with allowance being made for special classroom uses in a particular school, *e.g.*, Special Education instruction, funded educational program laboratories, and pre-K programs. GX 126. Secondary school capacity figures are based on a variety of program-related factors. GX 98, at 13. Differences between 1976 School Closing Plan and Phase II capacity figures (apparently attributable to changes in space utilization, *e.g.*, for special programs) are noted where applicable.

APPENDIX E — CONT'D

School Capacity

Elementary Schools	Engineering Department (1977, 1981)	NYU Report (1972)	1977 Phase II (1976 School Closing) Plans
1 (closed 1954)	240[a]	—	—
2 (converted 1945)	—	—	—
3 (closed 1976)	—	661	672
4 (closed 1976)	—	500	504
5 —	750	743[b]	672
6 —	460	497	420
7 (closed 1976)	—	661	560
8 —	550	581	560
9 —	604	605	560
10 —	725	—	532(504)
11 (Twain)	650	639	644(728)
12 (closed 1976)	—	520	476
13 —	900	887	756(859)
14 —	553	580	588(616)
15 (closed 1976)	—	320	448
16 —	475	473	448
17 —	425	394	476(448)
18 —	900	875	868(840)
19 —	650	635	672
20 (converted 1938)	—	—	—
21 —	475	529	532
22 —	450	450	504

[a] This figure is derived from a 1954 building utilization report. GX 2, at 3.
[b] This figure is based on an 80% realistic operating capacity. GX 115, at 43.

APPENDIX E — CONT'D

School Capacity

Elementary Schools	Engineering Department (1977, 1981)	NYU Report (1972)	1977 Phase II (1976 School Closing) Plans
23 —	850	634	756(840)
24 (closed 1976)	—	371	420
25 —	650	659	532
26 —	655	527	616
27 —	525	558	560(504)
28 —	490	450	560
29 —	550	504	560(588)
30 —	500	580	560
31 —	450	423	448
32 —	675	477	644(672)
King —	750	—	644
34 (Emerson) —	375	—	448(588)

APPENDIX E — CONT'D

School Capacity

Middle Schools	Engineering Department (1977, 1981)	NYU Report (1972)	1977 Phase II (1976 School Closing) Plans
Burroughs (converted 1978)	1,100	1,233[c]	1,100
Commerce (closed 1976)	—	720	1,000
Emerson	850	1,414[d]	850(650)
Fermi	1,200	1,280	1,000
Franklin (closed 1974)	—	—	—
Hawthorne	1,375	1,398	1,200
Longfellow	820	—	650
Twain	1,595	1,313	1,450
Whitman	1,025	1,105	1,200
High Schools			
Commerce (converted 1973)	—	—	—
Gorton[e]	1,405	1,296-1,377	1,650
Lincoln[f]	1,945	1,631-1,733	2,100
Roosevelt[g]	1,975	1,723-1,830	2,000
Saunders (old)[h] (closed 1978)	875	600[c]	750
Yonkers	2,525	2,576-2,737	2,800

[c] This figure is based on an 85% realistic operating capacity. GX 115, at 3.

[d] This figure includes School 34 (Emerson Elementary School) capacity.

[e] Auto and industrial arts shops were added in 1975. GX 644.

[f] Two classrooms and an auto shop were added in 1975. GX 644.

[g] Sixteen classrooms, a music room and an auto shop were added in 1976. GX 644.

[h] Saunders is presently located in the formers Burroughs facility.

87-1632 (3)

Supreme Court, U.S.
FILED
MAR 26 1988
JOSEPH F. SPANIOL, JR.
CLERK

No.

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

YONKERS BOARD OF EDUCATION
Petitioner

v.

UNITED STATES OF AMERICA AND
YONKERS BRANCH-NATIONAL ASSOCIATION
FOR ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

APPENDIX TO PETITION FOR WRIT OF CERTIORARI

VOLUME TWO

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School Remedy Order

UNITED STATES of America, Plaintiff,

and

Yonkers Branch, NAACP, et al.,
Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION,
City of Yonkers and Yonkers Community
Development Agency, Defendants.
Civ. A. No. 80 CIV. 6761 (LBS).
United States District Court,
S.D. New York.
May 13, 1986.

* * *

ORDER FOR DESEGREGATION OF
THE YONKERS PUBLIC SCHOOL SYSTEM

SAND, District Judge.

INTRODUCTION

On November 20, 1985, this Court held that actions taken by the City of Yonkers and the Board of Education, with respect to housing and public schools, were in whole or in part intentionally segregative. *United States v. Yonkers Board of Education* 624 F.Supp. 1276 (S.D.N.Y.1985). On December 18, 1985 the Court established a schedule for the action's remedy phase. The Yonkers Board of Education and the City of Yonkers were directed to submit remedy proposals on or before February 17, 1986.

On February 17, 1986, the Yonkers Board of Education submitted to the Court and the parties its proposed remedial plan, entitled "Educational Improvement Plan for the Yonkers Public School System". The United States and Plaintiffs-Intervenors (hereinafter "the NAACP") filed their responses to the Board's remedial proposal by March 12, 1986. On April 2, 1986 the Board

filed modifications to its original remedial proposal, entitled "Modifications to the Educational Improvement Plan submitted on February 17, 1986" to which the United States and the NAACP filed responses by April 7, 1986.

The Court conducted a hearing from April 8, 1986 through April 15, 1986 receiving testimony and documentary evidence to assist it in fashioning an appropriate remedy for the unlawful condition of segregation found to exist in the Yonkers Public Schools.

On April 22, 1986, this Court issued its opinion and Proposed Remedial Order. On May 7, 1986, the Board submitted its Response and Objections to the Court's Proposed Remedial Order. Following consultation with all the parties the Court hereby sets forth its order for the desegregation of the Yonkers Public School System.

A. IMPLEMENTATION STRATEGIES

The implementation strategies which form the foundation for the Yonkers public schools Educational Improvement Plan shall include:

1. *School Closings*

The district shall close the following schools effective September, 1986:

School #6
School #10
School #11
School #32
School #34
Fermi Middle School
Hawthorne Middle School
Yonkers High School

2. *Elementary Schools*

The district shall operate the following elementary schools effective September, 1986:

School #5
School #8
School #9
School #13
School #14
School #16
School #17
School #19
School #21
School #22
School #23
School #26
School #28
School #29
School #30
Enrico Fermi

The attendance zones for these schools shall be those areas set forth in Appendix A. During the 1986-87 school year, the Board shall develop and begin to implement attendance area magnet programs designated for School 19 and Enrico Fermi, to open September 1987.

3. *Dedicated Magnet Schools*

The district shall operate dedicated magnet schools to reduce racial/ethnic isolation by attracting students to programs that emphasize areas of special interest. Students will be recruited to leave their regular attendance zone school to enroll in schools that have no specific attendance zone. The district shall operate the following district-wide dedicated magnet schools effective September, 1986:

School #10—Early Childhood Center (Pre-K)

PEARLS—Gifted and Talented (Pre K-6)

Hudson River Museum Junior High School—Science, Social Studies and Creative Arts, Gifted and Talented (7-9)

Saunders Trades, Technical, Business and Computer High School (and Academic Magnet Component)

Until the new Hudson River Junior High School is completed the 7-9 Gifted and Talented magnet program currently housed in Emerson and Mark Twain will be moved to Hawthorne. In addition, the 4-6 Gifted and Talented component of the PEARLS program planned for September 1986 will also be housed in Hawthorne. Upon opening of the Hudson River Junior High School, Hawthorne shall house the PEARLS program Pre K-6. Until the new Hudson River Junior High School is completed, the Pre K-3 component of the PEARLS program will be housed in School #32.

Admission criteria for dedicated magnet schools, as well as for other magnet and specialized programs, will be submitted to a court appointed Monitor by June 1, 1986 for the magnet schools and programs to be implemented in September 1986 and by January 15, 1987 for the magnet schools and programs to be implemented in September 1987. Any party may offer its comments on such criteria to the Monitor. This procedure will be followed whenever a new program is slated to commence in the ensuing school term. All magnet students will take the required subjects and course work necessary for promotion and graduation, and all high school magnet students will have the opportunity to meet college entrance requirements. By June 15, 1986 the Board shall provide the Monitor and the parties with a description of the academic magnet program to be offered at Saunders.

4. *Attendance Area Magnet Schools*

The district shall operate the following attendance area magnet schools effective September, 1986:

School #18—Scholastic Academy for Traditional Education (K-6)

School #25—Science, Social Studies, Physical Development, Creative Arts, Extended Day (K-6)

School #27—Montessori, Humanities and Creative Arts, Extended Day (K-6) Martin Luther King—High Technology Computer Assisted Instruction, Extended Day (K-6)

Burroughs Junior High School—Career Development and Pre-Vocational (7-9)

Emerson Junior High School—Performing and Visual Arts, Multilingual Education (7-9)

Mark Twain Junior High School—Physical Development (7-9)

Gorton Senior High School—Pre-Professional Magnet Program (10-12)

Lincoln Senior High School—Performing Arts Magnet Program (10-12)

Roosevelt Senior High School—Communication Arts Magnet Program (10-12)

Effective September 1987, the following additional attendance area magnet schools will be opened:

School #19 Multilanguage Options—Global Perspective (K-6)

Enrico Fermi—Computer Assisted Instruction and Performing Arts (K-6)

The attendance zones for all of the attendance area magnet schools are set forth in Appendix A.

For the first year of this Order the attendance area elementary magnet school will be integrated by admission policy which will afford an opportunity for enrollment to all students in the district to the maximum extent consistent with the integrative goals of the Order. In implementing this policy the Board may impose such limitations as shall be appropriate to achieve its objectives.

At the secondary level attendance area students and interested magnet students from throughout the district will be selected by application controlling for racial and ethnic balance.

5. *Voluntary Student Transfers—VST*

The district shall direct a Voluntary Student Transfer program permitting minority students who attend predominantly minority schools to transfer to non-minority schools. Conversely, white students attending predominantly white schools may transfer to predominantly minority schools of their choice for the same reason. The purpose of such transfers is to enhance the racial/ethnic balance of the receiving school. Such transfers will not be permitted, however, if they would adversely impact on the racial composition of either the receiving or the sending school.

To encourage Voluntary Student Transfers, enrichment and supplemental programs will be established in those schools where sufficient seating capacity has been identified.

B. SCHOOL DISTRICT ORGANIZATION

The district shall establish a K-6, 7-9, 10-12 grade pattern organization as follows:

PROPOSED ORDER—SCHOOL DISTRICT REORGANIZATION

CIS = Compensatory Infusion Services
CAI = Computer Assisted Instruction
VST = Voluntary Student Transfer

School	Current Organization	Proposed Organization	Program Description *
#5	K-6 Neighborhood School	K-6 Neighborhood VST School	Writing to Read; Kindermath
#6	K-6 Neighborhood School	CLOSED	-
#8	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Zoo
#9	K-6 Neighborhood School	K-6 Neighborhood School	-
#10	K-6 Neighborhood School	Early Childhood Center	Early Childhood Center (PreK)
#13	K-6 Neighborhood School	K-6 Neighborhood School	Writing to Read
#14	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Zoo
#16	K-6 Neighborhood School	K-6 Neighborhood School	-
#17	K-6 Neighborhood School	K-6 Neighborhood School	Writing to Read; Kindermath
#18	K-6 Neighborhood School	K-6 Attendance Area Magnet	Scholastic Academy for Traditional Ed.; CIS
#19	K-6 Neighborhood School	K-6 Attend. Area Magnet (New Sch)	Multilanguage—Global Persp; Write to Read; CIS
#21	K-6 Neighborhood School	K-6 Neighborhood VST School	Foreign Language; Multicultural Ed. (FLAME)
#22	K-6 Neighborhood School	K-6 Neighborhood School	Foreign Language; Multicultural Ed. (FLAME)
#23	K-6 Neighborhood School	K-6 Neighborhood School	Kindermath; Every Child a Winner
#24	Warehouse	Warehouse	-
#25	K-6 Neighborhood School	K-6 Attendance Area Magnet	Sci; Soc S.; Ph Dev.; Creat.Arts; Ext. Day
#26	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Ecology
#27	K-6 Neighborhood School	K-Attendance Area Magnet	Montessori; Humanities; Creat.Arts; Ext. Day; CIS
#28	K-6 Neighborhood School	K-6 Neighborhood VST School	Writing to Read; Kindermath
#29	K-6 Neighborhood School	K-6 Neighborhood VST School	Project Ecology
#30	K-6 Neighborhood School	K-6 Neighborhood VST School	Foreign Language; Multicultural Ed. (FLAME)
#31 PEARLS	PreK-2 Magnet School	Continuing Education Center	Continuing Education Center
#32	K-6 Neighborhood School	PEARLS PreK-3 (Temporary)	PreK-3 Gifted/Talented (PEARLS)
#34	K-6 Neighborhood School	Jr. H.S. Perf. Arts Magnet Prog.	Jr. H.S. Performing Arts Magnet Program
King	K-6 Neighborhood School	K-6 Attendance Area Magnet	High Tech; CAI; Ext. Day; Write to Read; CIS
Emerson	7-8 Neighborhood School	7-9 Jr. H.S. (Magnet Program)	Performing/Visual Arts; Multilingual Ed.
Ferris	7-8 Neighborhood School	K-6 Attendance Area Magnet	CAI; Perf. Art; CIS; Every Child a Winner
Hawth.	7-8 Neighborhood School	4-6 PEARLS and 7-9 Jr. H.S.	Gifted and Talented (Grade 4-9)
Twain	7-8 Neighborhood School	7-9 Junior High School	Physical Development Program
Whitman	CLOSED	Teach. Train.Ctr/Adm. Complex	Teacher Train. Ctr/Adm. Complex***
Burroughs	-	7-9 Jr. H.S. Magnet	Career Development; Pre-Vocational
Hd.R+ Ma.	-	7-9 Gift/Tal. Magnet (New Sch)	Science; Soc St; Creat.Art; Gift/Tal.
Gorton	9-12 Neighborhood School	10-12 Senior Attend. Area H.S.	Pre-Professional Magnet Program
Lane	9-12 Neighborhood School	10-12 Senior Attend. Area H.S.	Performing Arts Magnet Program
Roos	9-12 Neighborhood School	10-12 Senior Attend. Area H.S.	Communications Arts Magnet Program
Saunders	10-12 Magnet School	10-12 Sr. H.S. Dedicated Magnet	Trades; Tech; Bus/Comp. Magnet School**
Yonkers	9-12 Neighborhood School	CLOSED: Saunders Moved In	-

* All neighborhood schools will also have a common core of enrichment programs. The programs described here are above and beyond the common core.

** And a strong academic Magnet component the precise nature of which shall be recommended by the district and which may be commenced on a grade-a-year basis.

*** Subject to the Court's final decision regarding Whitman following completion of the housing portion of the remedy hearings and without prejudice to that decision.

C. INTEGRATION GOALS AND TIME-TABLE

The District shall seek to achieve the following levels of desegregation as measured by the percentage of students attending desegregated schools at the respective grade pattern organization levels:

Start of School Year	% of Elementary Students	% of Junior High Students	% of Senior High Students
1986-1987	50%	100%	100%
1987- *	100%	100%	100%

For purposes of this Order and at the present time, a desegregated school shall be defined as within plus or minus 20 percentage points of the districtwide average of minority students, (the relevant minority population is comprised of Black and Hispanic students), for that grade pattern organization level; if the school is a dedicated magnet or an attendance area magnet, however, it is desegregated if its minority enrollment is within plus or minus 15 percentage points of the districtwide average of minority students at that grade pattern organization level during the first year of operation and plus or minus 10 percentage points of the districtwide average for that grade pattern organization level in the second year of operation.

*In the Spring of 1987, the Court will evaluate the progress made by the Board in the implementation of the voluntary aspects of this order for the purpose of establishing an appropriate timetable for the achievement of such goals. The Board shall report to the Court on March 16, 1987 the extent to which its plan has succeeded in achieving these goals through voluntary transfers. Should sufficient majority race students not voluntarily transfer from identifiably white schools and/or sufficient minority students not transfer to identifiably white schools, the Board shall propose its plan for accomplishing the desegregation of all its schools. The parties shall submit their comments to this proposal two weeks thereafter and, if necessary, the Court shall schedule

an evidentiary hearing before ordering into effect a proposal to fully integrate Yonkers elementary schools through such techniques as enrollment caps, the redrawing of elementary school attendance lines, and other measures. To permit possible utilization of redrawn elementary school attendance lines, the Board shall submit to the Court and the parties, no later than January 5, 1987, its proposal for such lines drawn consistently with the criteria set forth in the Court's Opinion and Proposed Order of April 22, 1986. The extent to which any redrawn elementary school attendance lines would be effective for September 1987 would depend upon the progress made by the Board in implementating the voluntary aspects of this Order. Depending upon the degree of that progress, the Court may order implementation of the redrawn attendance lines in whole, in part or not at all.

Those schools which do not meet the district's integration goals and which remain predominantly minority during the transition period shall provide supplemental educational services.

D. STUDENT ASSIGNMENT

1. *Recruitment*

In order to maximize the extent to which the integrative goals of this order will be reached through voluntary student assignments, the administration of the Yonkers public school system will establish an intense recruitment phase which will include the following activities:

- dissemination of brochures and fliers describing the new program options throughout the city.
- direct mailing of program options and descriptions to all parents.
- newspaper, billboard and radio and cable television announcements of available magnet programs.

- publication of all recruitment material in Spanish and Arabic.
- school based recruitment meetings conducted by building administrators and central office staff.
- telephone recruitment centers, English and Bilingual, through which parents will be called directly to explain magnet programs.
- telephone hotline to respond to inquiries.
- acceptance of initial registration by telephone as appropriate.
- community meetings with minority groups and organizations to solicit support and assistance in the dissemination of magnet program availability.
- door to door canvass by district personnel to explain magnet program availability.
- magnet fair in which students and their parents will be transported to central display centers with movies, slides and material available for briefing.

2. *Selection*

A fundamental aspect of the implementation procedures in the Remedy proposal will be the requirement that all parents must select the schools which their children will attend for September 1986 even if it is the attendance area school. Parents must indicate their first three choices for 1986-87. For the first year, no student will be admitted into any school, magnet school, or attendance area school without the parents having indicated that selection as one of the three choices. The Board shall make every effort to assign each student to the optimum choice school listed on his or her choice form.

School Remedy Order

For 1987-88, the parent or guardian of each student in the district will again be required (as early in the school year as is deemed feasible but no later than March 1, 1987) to submit to the Board in writing a school choice form listing three choices for his or her child. For the 1987-88 school term, at least one of the child's choices must be a school where that child's attendance will further the goals of desegregation as defined in this order. Again, the Board shall make every effort to assign each student to the optimum choice school listed on his or her form. The same procedure will be followed in subsequent years for students living in the district but attending public school for the first time, students born in the district who are beginning school, students transferring into the district, and students moving from one grade organizational level to the next (e.g., from junior high to high school).

This procedure will begin immediately after the issuance of this Order. In subsequent years, as much planning lead time shall be provided as is possible. The objective of requiring three options is to force a choice and thereby inform parents of the availability of magnet program options and encourage their selection. All applications will be logged and numbered and a receipt given for each application. Only one application per child will be accepted. The procedure would be initiated immediately after issuance of the Order and certainly before the end of the 1985-86 school year. In subsequent years, it would be initiated early in the school year to provide as much planning lead time as possible for the district and for parents. In addition to selection forms and program descriptions which will be mailed to all parents in the district, building principals, counselors and teachers will be required to meet with parents and review the options available to them.

(a) Admission Criteria

After the initial selection phase has been completed, the district shall use the following process for admission into the

magnet schools provided it does not prevent the district from achieving its goal for desegregation:

> For those magnet schools or programs in which the requests of qualified students do not exceed stated capacity, those students will be immediately notified and admitted.
>
> For those magnet schools or programs in which the requests of qualified students are greater than stated capacity, first priority will be given to those students already enrolled. Then, a random selection will be conducted on the basis of desired integrative goals. Such random selection will be conducted publicly with observers.
>
> For those students whose first choice of a magnet school is not granted, the parents will be individually contacted to reaffirm the desirability of the second or third choice. Every effort shall be made at this stage to encourage the parents to accept the second or third choice of a magnet school. For those students who are placed on a waiting list at the request of the parents because of the unavailability of space, a requirement will be established that they must reapply during the next recruitment phase but will be given preference provided that the granting of such preference will not adversely impact the racial/ethnic balance of the school.
>
> If admission criteria are met, every preference shall be given to the siblings of children already enrolled in magnet schools provided that such admission does not adversely impact on the racial/ethnic balance of the magnet school.

(b) Sibling Preference

When more applications for vacancies in a school or program are received than there are seats available, all applications will be randomly selected. After random selection, a rank-ordered waiting list, based on the random selection, will be developed. Names of siblings not initially accepted will be placed at the top of the

rank-ordered waiting list. If only one twin is accepted the other twin will also be enrolled provided that whatever admission criteria exist, if any, are met.

(c) Admission to Specialized Programs *Gifted and Talented* students selected for participation in the district's Gifted and Talented Magnet Programs are those who, by virtue of potential and/or achievement, are capable of high academic performance. Eligibility for the program is determined for each applicant following a careful analysis of standardized test scores, report card information, teacher input (on learning, task commitment, creativity and leadership) and parent input when possible. Entrance examinations will be included at the fourth grade level and above. All available information will be recorded and handled through a weighted matrix traditionally used for the selection of Gifted and Talented students. (Baldwin Matrix). On the basis of the test scores of the students who apply, a cut-off point will be determined and then students shall be admitted on a racial/ethnic balanced basis. It is anticipated that the selection will be geared toward the top five percent over the district cut-off point or points on multi-measures. Student selection shall be made to ensure a balanced racial/ethnic student composition and will be conducted by a committee of at least three administrators, to include at least one of whom would be minority.

Enrollment in these programs continues from one grade level to the next provided a student is achieving at the expected rate and level and the parents desire program continuation. A student may be counseled out of the program if progress is poor and/or the program is not in the student's best interest.

Citywide High School Career Specialty Magnet Programs will enroll students who have a sincere interest and believe they have the ability to succeed. Prior to submitting an application for such a program, counseling services will be provided so that there is reasonable expectation that the student will meet the success. The student and parent will be provided with information clearly

outlining the schools' programs, expectations, and course requirements. If the number of applicants exceeds the available space, students will be selected based upon aptitude for the specific area, teacher recommendation, report card information and attendance patterns. These data will be weighted and ranked to ensure balanced racial/ethnic participation. Student selection will be made by a team of at least three administrators, at least one of whom shall be a minority member.

The Performing and Visual Arts Magnets will accept applications from interested students who must also undergo an audition in their specific areas of interest. These areas include Dance, Drama, Vocal and Instrumental Music. Selection will be made on the basis of specific criteria for each performing arts area. Student selection will be made to ensure racial/ethnic balance and selection will be made by a group of at least three performing arts teachers, at least one of whom shall be minority member.

Students applying for Fine Arts and Graphic Arts programs must submit a portfolio of work for review. Selection will be made on the basis of specific criteria for the Visual Arts. Student selection will be made to ensure a racial/ethnic balance and selection will be made by a group of at least three Visual Arts teachers, at least one of whom shall be a minority member.

(d) Notification of Status

Parents or guardians will be notified by mail indicating whether their children have been accepted, or placed on a waiting list for magnet schools or programs. Parents will be asked to confirm their intention to enroll their children in the program into which they have been accepted by mailing back within a stated return period, a confirmation letter which will have been enclosed in their letter of notification.

3. *Appeal Procedure*

Parents who wish to question admission procedures or appeal the decision of the selection committee will be required to put appeal in writing. The parent first will be invited to discuss the concern with a magnet counselor. If, after the counselor interview, the parent desires to continue the appeal, a Placement Reveiw Committee will review all material and make a final determinaiton of magnet placement. The decisions must not adversely affect the integrative objectives of this Order. If a student cannot be accepted immediately after review, an otherwise qualified student will be place on a priority waiting list. The Placement Review Committee will be composed of at least three Central Office administrators to be determined by the Superintendent of Schools and will include minority participation.

E. STAFF ASSIGNMENT

The district shall make every effort to ensure that by September, 1986, the racial composition of teachers at each school within approximately plus or minus five percentage points of the districtwide average for minority teachers, as a result of reassignments in connection with school closings and conversions and the reassignment of teachers to magnet schools and magnet programs. Thereafter, the district shall attempt to maintain the racial distribution of teachers on a reasonably uniform basis, while respecting the provisions of the collective bargaining agreement between the district and the Yonkers Federation of Teachers.

If the Board cannot achieve this goal while adhering to the collective bargaining agreement, the parties may make applications to the Court for the requisite modifications.

With respect to the staffing of magnet programs and magnet schools, the district and the Yonkers Federation of Teachers have agreed to establish a process for selection which would address the mutual concerns of both parties.

Although the Court denied the application by the NAACP for the adoption of an affirmative action hiring program at this time such ruling is without prejudice to renewal subsequent to March 16, 1987 if it should appear that the aforesaid efforts of the Board and the Yonkers Federation of Teachers have not achieved satisfactory levels of minority staff hiring and distribution throughout the Yonkers school system.

F. SPECIAL EDUCATION

1. *Principles for Administration of Special Education*

In the administration of its Special Education services, the district shall adhere to the following principles:

- That handicapped students be guaranteed the same constitutional rights provided all other students.

- That all other regular education interventions and strategies are explored and utilized where appropriate prior to a students referral for and placement in special education programs.

- That in as much as special education is one among many instructional options encompassed within a continuum of educational services, it is the responsibility of both regular and special education to meet the educational needs of handicapped students, particularly with respect to such areas as occupational education, gifted and talented programs, limited English proficiency services and other magnet programs operated by the school district.

- That to the maximum extent appropriate, handicapped students should be educated with students who are not handicapped and that removal of handicapped students from the regular education environment should occur only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily.

• That handicapped students are entitled to the right to due process, and the right to participate in appropriate education programs and activities in the least restrictive environment.

• That the provision of appropriate educational opportunities for handicapped students is based on the identification and evaluation of each student's unique needs.

• That tests and evaluation materials will be non-discriminatory and utilized for the purpose intended.

• That all handicapped students and their parents should be afforded the protections of procedural due process in the identification, evaluation and placement within special education, including collection, use and dissemination of all data developed by the district for that purpose.

• That handicapped students be grouped for classroom placement by age-appropriate functioning level, and that such groupings reflect the system-wide racial/ethnic composition of all like special education groups at that functioning level, the only exception to this racial/ethnic criterion for grouping shall be those groupings designed for the provision of bilingual special education services.

• As legally mandated, each student receiving special education services will have an annual program review by the Committee on the Handicapped in order to evaluate the appropriateness and effectiveness of program placement and services and also a triennal assessment for the purpose of determining the need for continuation, change, or termination of special education services.

2. *Criteria for Location of Special Education Program Within Individual Schools*

• Programs for the following students; secondary—resource (R); secondary—learning problems (L); and secon-

dary—emotional problems (E), will be placed in all junior and senior high schools with attendance zones to enable students receiving these programs to attend school in their income attendance zone.

• Programs for the following students; elementary—resource (R); elementary—learning problems (L); and elementary—emotional problems (E), will be placed in attendance zone elementary schools to the extent possible. In the absence of adequate numbers of students of like functioning level in each elementary attendance zone school, programs for students of like functioning level will be placed in schools closest to their attendance zone school.

• Programs providing services to elementary students who are educable mentally retarded (ER); hearing impaired (H); and neurologically impaired (N), will be placed in schools located in approximately the center of the city so that transportation is kept at a minimal level.

• Programs providing services to secondary students who are educable mentally retarded (ER); hearing impaired (H); and neurologically impaired (N), will be placed in each attendance zone secondary school to the maximum extent possible based upon the numbers of students requiring such services. In the absence of sufficient numbers of students of like functioning levels, students will be placed in schools closest to their attendance zone schools.

• Programs for "low incidence" handicapping conditions providing services to elementary and secondary students who are trainable mentally retarded (TR); speech and language impaired (SL); gifted learning disabled (HL); bilingual handicapped (LB); multiple handicapped (MH); physically or orthopedically handicapped (PH); Rockland Day Treatment Program (E-YDT); Yonkers Learning Center (E-YLC); diagnostic (D), and emotionally disturbed students with non-aggressive behavior

(EN), will be placed in schools compatible with the unique needs of the students and the regular education programs within the schools.

• Programs providing speech (Spch) or vision (Vis) resource services for handicapped students whose only special education needs are these services will be provided to the students in their attendance zone schools.

3. *Guidelines for the Assignment of Special Education Students into Programs Within Schools*

• Transportation shall be provided to special education students where their homes are one and one-half miles from their assigned schools. Such transportation shall not exceed forty minutes of travel time and shall be scheduled to ensure that the school day affords a full day of instruction. Transportation will be provided to any special education students regardless of their residence and school program if the Committee on the Handicapped (COH) determines that the handicapping condition is such that transportation is required.

• Special education students shall have the opportunity to be mainstreamed in accordance with their Individual Education Program (I.E.P.).

• The district shall make every effort to maintain elementary special education students in their assigned K-6 school in order to ensure continuity of program. In the absence of an appropriate program in the assigned elementary school, the special education student may be reassigned to a different school only once. However, a change in placement by the COH overrides this one time only reassignment.

• Special education students are ensured access to all district extra curricular activities and, in addition, will be provided the necessary transportation.

• Special education students are ensured access to all regular education occupational and magnet programs. Applicants for such programs will be required to complete the application process and to be diagnosed for career options by a professional. The assessment will be made available to the ~~COH~~ for recommendation.

• The district shall make every effort to ensure that the racial/ethnic composition of students of like functioning level student groupings shall reflect the composition of students of like functioning levels on a districtwide basis.

• Special education students will be placed in classes designed to meet their needs and not assigned to integrate schools.

4. *Guidelines for the Placement of Limited English Proficient (LEP) Students into Special Education Classes*

• Limited English Proficient (LEP) students who are of foreign birth or ancestry, who speak little or no English, and who have scored below the statewide reference point on an English language proficiency test, and who are referred to the COH for possible Special Education, should be further assessed for language dominance in their native language in order to ascertain the language to be used for further assessment.

• The use of tests for potentially handicapped LEP students will be non-biased and non-discriminatory in accord with the most current research. LEP students will be assessed by diagnosticians proficient in the child's native language, where available. In the absence of such a diagnostician, the student will be provided a translator during the assessment process. In this event, the COH will ensure the use of non-verbal assessment instruments as well. A native language representative will assist the parent/guardian and student in all aspects of the evaluation, diagnostic, and due process procedures.

• Placement of the LEP child will be based on the student's functioning level and native language proficiency.

G. BILINGUAL EDUCATION

The district shall continue to meet the needs of all Limited English Proficient students under this Order and the FLAME and multilingual programs shall not be considered a substitute for bilingual education.

English proficient Hispanic (monolingual or bilingual) students who are not eligible for the bilingual education program according to the State regulations will be assigned in accordance with the requirements of this order. Former LEP Students who have achieved English language proficiency and/or have been in a program of bilingual education of ESL for three years will be mainstreamed and provided the same opportunity to participate in all educational aspects of this Order. Bilingual education and ESL staff will be assigned according to need, i.e., the numbers of LEP students in a building, consistent with the reassignment of students throughout the district.

By June 1, 1986, the Board shall designate where bilingual programs shall be offered at both the elementary and secondary level for the 1986-87 school year and outline how it shall provide language assistance for Hispanic students that wish to enroll in special magnet programs.

H. TRANSPORTATION

Under this Order, transportation will be provided:

- to those students who elect to enroll in Magnet Schools.
- to those students who elect to participate in the voluntary student transfer program.
- to those students who are required to travel in excess of 1½ miles to their neighborhood school.

- to parochial students who live within the City of Yonkers and who travel more than 1½ miles to their school within the City of Yonkers.
- to those adults currently enrolled in the Adult Programs located in the old Commerce building when it is relocated to School #31.

When student assignments are established, a consultant transportation firm shall be contracted by the district to develop a safe, reasonable, and manageable transportation program that will be equitable in terms of burden for both majority and minority students.

I. HUMAN RELATIONS

The district shall implement a human relations program specifically designed to achieve the following objectives:

- To increase alternatives of administrators in analyzing potential inter and intra group problems and promoting group cooperation.
- To improve communications among administrators, teachers, students and community.
- To enhance the awareness of administrators, school personnel and students of diverse cultural backgrounds.
- To increase the training of a cadre of administrators and teaching personnel to facilitate the use of Human Relations experiences with students.
- To provide students with experiences which will assist them in developing and facilitating communication, decision making and problem solving skills.
- To assist students in developing an understanding of their rights and responsibilities as members of the school community.

- To provide an atmosphere in which the school community will be assured of the safe transport of its students to and from school.

- The district shall implement the schedule of activities related to human relations, staff development and community education included in Appendix B of this Order.

J. FUNDING

It is anticipated that the necessary funding will be provided by the City of Yonkers, and the Board is to advise the Court forthwith if for any reason it is unable to implement the programs set forth herein because of a lack of adequate funding.

K. ASSURANCES

- The Board shall establish a comprehensive staff development program which will be a component of its ongoing inservice program for teachers and administrators and which will address areas such as racial attitudes, student discipline procedures, academic achievement and performance goals, teaching in a diverse racial/ethnic environment, and integration goals.

- The Board shall provide students equal access to extracurricular activities. To facilitate such participation, it shall provide appropriate after school transportation for students eligible for transportation.

- In the implementation of this Order, the Board shall provide a comprehensive program of information to the community, including committees of parents and other members of the public who have a particular interest in the issues that may arise during implementation, and to staff in an effort to attain maximum participation in all aspects of the integrative component of this Order including but not limited to media, community meetings, brochures, leaflets, and other recruitment activities. Plain-

tiffs-Intervenors shall encourage members of the minority community to support the integrative components of this Order.

• The Board shall ensure that with respect to the use of any desegregation techniques such as school closing or openings, site selection and new construction, and boundary adjustments, its policies and practices shall be consistent with the integrative purpose of this Order, as well as the principles of sound management and administration of the school district.

• The Board shall ensure that this Order is afforded every opportunity for successful implementation through the provision of a comprehensive program of information to the community as well as appropriate human relations programs for staff and students.

• The Board shall ensure that its Code of Disciplinary Standards is publicized and that clear and adequate notification is provided all students, parents, teachers and administrators of such standards and of the non-discriminatory application of these disciplinary procedures.

• The Board shall ensure that the location of transfer of ESL/Bilingual programs in its elementary and secondary schools take place in a manner which will not detract from the objectives of this Order while ensuring that sufficient numbers of students requiring such services are enrolled at each location in order to justify the provisions of bilingual or ESL programs. Ample provision shall be made to enable, to the maximum extent possible, students desiring bilingual programs to participate in the dedicated and area attendance magnet programs described elsewhere herein.

• The Board shall ensure that it continue its obligation to fully implement the terms and conditions of its existing agreements with the U.S. Department of Education's Office for Civil Rights and the New York State Education Department which have been designed to ensure compliance with Title VI of the

Civil Rights Act of 1964, P.L. 94-142, Section 504 of the Rehabilitation Act of 1973, as amended and the New York Commissioner of Education's Regulations regarding the provision of special education.

• The Board shall ensure, to the maximum extent possible, that racial isolation does not occur within any school building or program operated by the Board.

• The Board shall ensure the provision of remediation to those students scoring below the State Reference Point in the State mandated Pupil Evaluation Program in the basic subject areas of reading and mathematics. In addition, the Board shall encourage the participation of those students in need of remediation in these magnet programs specifically designed to improve student achievement levels in the basic skills areas.

L. MONITORING

Each party, after consultation with the others, shall suggest to the Court one or more candidates for Monitor.

The nominees must be both qualified and willing to serve, and his or her specified compensation shall be borne by the school district. A Monitor shall be empowered to request specific information from the school district relevant to implementation of this Order. She/he shall issue reports to the Court and the parties assessing different aspects of implementation of the remedy and shall be empowered to make recommendations to the Court with respect to changes she/he believes necessary to make the plan more effective. The Board and the other parties shall make their recommendations within five (5) days from the date of this Order.

Once a Monitor is appointed, one of his/her preliminary tasks shall be assessment of the school district's admissions criteria for the magnet schools and magnet programs. These criteria shall be submitted to the Monitor by June 1, 1986 for

those programs that are continuing or will be beginning in September, 1986. Admissions criteria for programs slated to commence in September, 1987 will be submitted to the Monitor by January 15, 1987 and the same procedures will be followed. Any party may at each time offer comments on these admissions criteria.

M. PARENT COORDINATOR

The parent coordinator shall be responsible for working with parents in recruitment and information dissemination and for developing a working relationship with parent organizations in the community. The parent coordinator also shall foster communication with non-English speaking parents. The Superintendent shall notify the Court and all of the parties of the name, credentials and background of the prospective appointee for this position ten (10) days before any appointment is made final and no later than June 1, 1986.

N. REPORTING

By March 16, 1987, the Board of Education shall file with the Court and serve on Counsel for the United States, the NAACP and the Yonkers Federation of Teachers, a report setting forth the following information for the 1986-87 school year:

1. Total Student Enrollment, by race, of:

a) the school district, not including Special Education,

b) each organizational pattern in the district, not including Special Education,

c) each school facility, not including Special Education students,

d) each Special Education Program (or non-categorical/functional level) by race and by age level grouping,

e) each Special Education class together with designation of each student's home school attendance area.

2. The location of each special education class (by classification).

3. The race of each teacher for each special education class.

4. The number of students by race, participating in and/or requesting to participate in voluntary student transfers within the district.

5. The number of students by race, participating in and/or requesting to participate in each of the Magnet Programs and in each of the Magnet Schools.

6. The total faculty, by race and experience level, of the school district.

7. The total faculty, by race and experience level, of each organizational pattern and school facility, excluding Special Education teachers and bilingual teachers.

8. The total school administrative staff, by race, of each school facility.

9. A current and accurate description of all Magnet Programs in operation, and those to begin in September 1987.

10. A description of the district's human relations program.

11. A description of the district's staff development program.

12. The program capacity of each of the district's schools.

O. MISCELLANEOUS PROVISIONS

1. City of Yonkers

The City of Yonkers and the Yonkers Community Development Agency, their officers, directors, agents, employees and successors, shall not intentionally perpetuate or exacerbate racial

segregation in the Yonkers public schools by engaging in conduct which blocks or otherwise refuses to permit because of race the development or construction of public or subsidized housing units in violation of Title VIII of the Civil Rights Act of 1968 or the Fourteenth Amendment to the Constitution.

2. Prohibition Against Discrimination

The Board, its members, officers, agents, employees, successors, and all persons in active concert or participation with them shall not discriminate against any student on the basis of race, color, or national origin in the operation of the Yonkers City School District.

P. MODIFICATIONS

The Board shall notify the United States, Plaintiff-Intervenors and Defendant-Intervenors of any proposed modification in the plans, program, or policies described in this Order. Unless the Board shows good cause why the time should be changed, the United States and Plaintiffs-Intervenors shall have sixty (60) days from the date of such notice in which to object to the proposed modification. If the United States or Plaintiff-Intervenors or Defendant-Intervenors object, no such modification shall be put into effect by the Board without the approval of the Court. Nothing contained herein is intended or shall be construed to prohibit the Board upon due notice be heretofore provided from changing or altering any school boundaries or establishing any new attendance zone, so long as modification, alteration, or new zone neither impedes the integration envisioned under this Order not violates any law relating to student assignment.

Q. CONTINUING JURISDICTION

During the Board's implementation of the Plan, the Court shall retain jurisdiction of this action to enforce the terms of this Order and for all purposes consistent with attaining the objectives

of this Order. Plaintiff or Plaintiff-Intervenors may file a motion with the Court at any time during the period of implementation requesting enforcement or modification of this Order if the Board has failed to make reasonable progress in achieving the integrative objectives of the Plan. In ruling on any such motion, the Court shall base its determination on the totality of the circumstances, and shall seek to tailor any modification to remedy the specific non-compliance found to exist.

At any time, the Board may, if it deems it appropriate to do so, move for a declaration of unitary status.

UNITED STATES of America, Plaintiff,

and

Yonkers Branch-National Association for the Advancement of Colored People, et al., Plaintiffs-Intervenors,

v.

YONKERS BOARD OF EDUCATION; City of Yonkers; and Yonkers Community Development Agency, Defendants.

* * *

No. 80 CIV 6761 (LBS).

United States District Court,
S.D. New York.

May 28, 1986.

* * *

HOUSING REMEDY ORDER

SAND, District Judge.

Pursuant to this Court's liability findings of November 20, 1985, the evidence adduced at the remedial hearing, the supplemental findings set forth in the Opinion filed this date and the subsequent written submissions and oral arguments of the parties, the Court enters the following Order.

I. *Injunction*

The City of Yonkers, its officers, agents, employees, successors and all persons in active concert or participation with any of them, are permanently enjoined from:

A. blocking or limiting the availability of public or subsidized housing in east or northwest Yonkers on the basis of race or national origin;

B. confining public or subsidized housing to southwest Yonkers on the basis of race or national origin;

C. otherwise intentionally promoting racial residential segregation in Yonkers;

D. interfering with any person who is exercising or attempting to exercise his or her rights to equal housing opportunities;

E. taking any action intended to deny or make unavailable housing to any person on account of race or national origin, or

F. impeding or interfering with the successful implementation of the school desegregation remedy.

II. *Fair Housing Resolution and Office*

It is further ordered that the City shall take the actions described below to implement a fair housing program.

A. Within 30 days of the date of this Order, the City shall adopt a Resolution of the City Council setting forth the fair housing policy of the City of Yonkers: to assure equal housing opportunities and nondiscrimination in the provision of housing throughout the entire City.

B. Within 60 days of the date of this Order, the City shall adopt a Resolution of the City Council establishing a Fair Housing Office (FHO). The FHO shall have the general responsibility to administer and implement the fair housing policy of the City and shall have the specific responsibilities described below. The City shall provide for adequate funding of the FHO throughout the life of this Order to ensure that it may fully carry out its responsibilities. The FHO shall establish a principal office and auxiliary offices as needed. The FHO shall publicize and promote the services it offers.

C. The FHO shall be headed by an Executive Director. The City shall provide funds for sufficient staff to carry out all of the

FHO's responsibilities under this Order. Staff shall be hired by the Executive Director.

D. Within 30 days after passage of the FHO Resolution, the City shall submit to the United States and plaintiffs-intervenors the names and qualifications of not less than three candidates for Executive Director. Within 15 days thereafter, the United States and plaintiffs-intervenors shall respond to the City, indicating which, if any, of the candidates are acceptable. The City Manager shall, within 15 days of these responses, appoint a candidate from among those approved by both the United States and plaintiffs-intervenors. If the United States and plaintiffs-intervenors do not agree on the acceptability of any of the City's candidates, they shall include in their responses to the City the names of two or more candidates of whom they approve. If the City Manager finds none of these alternative candidates acceptable, this Court shall make the selection from among all those suggested by the parties. If the position of Executive Director becomes vacant during the life of the decree, the same procedure shall be followed in making subsequent appointments with time periods adjusted so that the position does not stay vacant for longer than 60 days.

E. In order for the other parties effectively to monitor the City's compliance with its obligations under this Order, the FHO shall submit to the City Manager and the United States and plaintiffs-intervenors each year during the life of this Order a proposed plan of activities and programs for the following year. The first such plan shall be submitted within 60 days of the appointment of an Executive Director. The United States and plaintiffs-intervenors shall have 30 days to make suggestions and comment on the plan before it is adopted by the City Manager. The City Manager must adopt a plan within 60 days of its submission.

The FHO shall also, on a semi-annual basis, report to the United States and the plaintiffs-intervenors on its activities for the period, including any difficulties encountered in carrying out its

responsibilities under this Order. The FHO shall maintain detailed records of its activities and, upon reasonable notice, shall make these records available to the United States or plaintiffs-intervenors for review.

F. The FHO shall have the functions and responsibilities as set forth below:

1. On an ongoing basis, the FHO shall review the activities of City agencies and offices for compliance with the fair housing policy of the City and the terms of this Order. The FHO shall, as it deems appropriate, make recommendations to such entities for actions to be taken to ensure compliance with the fair housing policy and this Order. In its reports to the United States and plaintiffs-intervenors, the FHO shall include full information about its reviews of City agencies' activities, any recommendations made by the FHO and any agency action taken in response to such recommendations.

2. The FHO shall conduct educational programs for City and School District personnel, as well as for the community at large, to explain the City's fair housing policy and its enforcement efforts and obligations under this Order. Such programs should be designed to elicit support for the remedial efforts of the City and the Board of Education and to promote racial harmony in Yonkers. The FHO shall coordinate with the School Board the development and presentation of programs explaining fair housing policy to City school children. These educational programs shall be initiated as soon as possible (and, in no event, more than 60 days) after the appointment of an Executive Director. To the extent appropriate and feasible, the FHO shall make use of the services and experience of private and public organizations which have developed programs to aid communities experiencing desegregation.

3. The FHO shall collect information relating to housing needs and services, identify available rental and sales units within

the City and provide information to homeseekers seeking housing on a nondiscriminatory basis and inform them of the availability of rental management companies, brokers, local lending institutions and agents. To assist the FHO in the gathering of this and any other relative information, the FHO shall have the right and authority to issue subpoenas which shall be enforceable by this Court. The FHO shall perform all of its functions on a continuing and nondiscriminatory basis throughout the life of this Order. The FHO shall ensure that all persons who request its assistance in obtaining housing are made aware of housing opportunities in all areas of the City. The FHO shall in particular make such information available to all persons in the City receiving Section 8 certificates who seek its services and the Municipal Housing Authority (MHA) shall inform persons obtaining certificates from that agency of the services available through the FHO.

4. The FHO shall offer training concerning fair housing practices for persons in the housing rental and sale business. In addition, the FHO shall require and conduct training concerning fair housing practices for all persons responsible for the management or marketing of housing currently receiving City assistance or housing developed pursuant to the Order.

"5. The FHO shall ensure that all housing made available pursuant to the operation of this Order, and all housing otherwise receiving City, state or federal assistance, including housing in the southwest quadrant, be affirmatively marketed either through the FHO's own efforts or by review, approval and monitoring of the affirmative marketing plans of persons providing such housing. These efforts shall be designed to ensure that such housing is made available to all persons regardless of race or national origin and to ensure that persons who, based on past experience, have been least likely to occupy housing in a particular area of the City are fully informed of all housing opportunities there. The affirmative marketing plans shall be consistent with the occupancy priorities provisions(¶ VII) of this Order.

6. The FHO shall coordinate with appropriate personnel from the Yonkers Board of Education to ensure that demographic data, school enrollment data, plans for housing and school program development and other information relevant to the remedial process is available to both the Board and the City.

7. In providing information about available housing resources to persons seeking such information, the FHO also shall inform such persons of their rights to equal housing opportunities under the City's fair housing policy, state law and the Federal Fair Housing Act of 1968. The FHO shall alert persons seeking housing that a refusal to rent or sell on account of race or national origin or the imposition of different terms and conditions of rental or sale on account of race or national origin, is against the law, and shall encourage such persons to immediately report any suspected discrimination to the FHO. The FHO shall refer persons who wish to file complaints concerning suspected discrimination to, as appropriate, the Yonkers Commission of Human Rights, HUD, the New York Division of Human Rights, and the United States Department of Justice, and shall inform them of other assistance available through private non-profit agencies. The FHO shall assist complainants in communicating with the appropriate agencies and shall cooperate with such private and governmental agencies in their activities. The FHO shall not conduct or intervene in litigation proceedings except proceedings to enforce subpoenas issued pursuant to paragraph 3 hereof."

III. *Transfer of Section 8 Administration*

It is further ordered that the City shall, within 60 days of the date of this Order, seek HUD approval to transfer administration of its Section 8 existing program to the Yonkers Municipal Housing Authority (MHA). The FHO shall cooperate with the MHA in assisting certificate holders to obtain housing in all areas of the City on a nondiscriminatory basis and shall report on its own and the MHA's actions in this regard. HUD shall advise the

Court and the parties within 30 days after such application whether it has approved the transfer, and if not, its reasons for such disapproval.

IV. *Public Housing Units*

The City has previously committed itself to provide acceptable sites for 200 units of public housing as a condition for receiving its 1983 Community Development Block Grant ("CDBG") funds but has failed to do so. Pursuant to the 1984 HUD-NAACP Consent Order entered by this Court, HUD agreed to fund 200 units of public housing east of the Saw Mill River Parkway. The Consent Order provided that HUD would initiate procedures to reduce funding of the City's 1984-85 CDBG entitlement grant up to its full amount unless the City submitted to HUD for preapproval sites for at least 140 of the 200 units. But for the terms of this Order, HUD's authority to commit the 1984-85 CDBG funds would expire on September 30, 1986 (funds for the grant were appropriated in 1983 and "remain available until September 30, 1986." P.L. 98-45, 97 Stat. 223, July 12, 1983). HUD shall obligate the funds prior to the expiration of the funding authority in September if either (a) the City submits an acceptable Housing Assistance Plan (HAP) and other documentation as required by 24 C.F.R. § 570.302 prior to that expiration, or (b) such HAP and documentation are deemed submitted as herein provided. If the City submits all requisite documents, HUD shall obligate the funds, but make their availability conditional on the City submitting acceptable sites in East Yonkers for development of 140 units of public housing. (The Court finds such action would be consistent with HUD's obligations under paragraph 6.B. of the March 19, 1984 Consent Decree with the NAACP). The City would accept this condition by execution of a grant agreement containing the condition. Because, but for the terms of this Order HUD could not obligate the funds until the City submits all necessary documents, the City is hereby

ordered to submit the required documents and execute the conditional grant agreement prior to the expiration of the funding authority, and to make timely submission of acceptable sites.

A. Accordingly, it is ordered that the City shall, within fifteen (15) days of the date of this Order, submit to HUD an acceptable HAP for the 1984-85 program year and other documentation required by 24 C.F.R. § 570.302. HUD shall advise within ten (10) days thereafter if the HAP and other documentation is acceptable. If the City fails to submit an acceptable HAP and other documentation as heretofore provided, plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD within the next five (5) days, and upon approval by this Court, said submission shall be deemed to be the HAP for the City of Yonkers for the 1984-85 program year and to have satisfied any and all HUD regulations and relevant statutes requiring such HAP.

B. It is further ordered that the City shall, within fifteen (15) days of the date of this Order, execute a grant agreement with HUD for the 1984-85 program year, with the condition that receipt of the grant depends on submission of acceptable sites for 140 units of family public housing. If the City fails to execute such grant agreement within fifteen (15) days from the date of this Order, plaintiff and plaintiffs-intervenors shall submit such an agreement to the Court and to HUD within the next ten (10) days, which grant agreement, upon approval by the Court, will be deemed to have been executed by Yonkers and to have satisfied any and all relevant statutes and HUD regulations requiring such agreement.

C. It is further ordered that the City shall within thirty (30) days of the date of this Order, submit to HUD for preapproval at least two sites for 140 units of family public housing, along with the necessary supporting documentation. HUD shall advise within fifteen (15) days thereafter whether the sites so submitted are approved. If the City fails to designate approved sites within

the time periods set forth herein, and only if the City fails to make such designation, then the City will be deemed to have submitted as said sites such combination of the following sites *and* any other available sites as plaintiff and plaintiffs-intervenors shall designate and the Court shall approve:

(a) School 4. This site may be used for rehabilitation of the existing school building and new construction on that site, or new construction on the black top area, or some combination thereof;

(b) School 15 and the Walt Whitman School. If this provision becomes operative by virtue of the failure of the City to designate alternative sites, the School Board is hereby ordered to return the Whitman site to the City. The School Board may, if it wishes, reserve to itself rights to occupy such space on the Whitman site as shall be reasonably necessary and appropriate for teacher training and library storage facilities (the only uses for Whitman presently envisioned by the School Board).

Nonassisted units may also be placed on the aforesaid sites together with assisted units (*e.g.*, in an 80/20 ratio) provided that the total number of assisted units resulting from all site designations is 140 units.

D. It is further ordered that, within ninety (90) days of the date of this Order, the City shall submit sites to HUD, with all the necessary supporting documentation for the remaining 60 units of public housing committed by HUD pursuant to the 1984 Consent Order, which sites shall (unless otherwise authorized by the Court) be selected from a list contained in Exh-NAACP RH-16 (6 available privately-owned sites listed by the Yonkers Planning Director as suitable for development of public housing). Provided, however, that no privately owned sites from this list shall be submitted unless such submission is accompanied by either (a) an agreement of sale or assignable option between the MHA and the owner of the property or (b) a written agreement between the MHA and the owner under which the owner (or

developer with an option that provides control) of the site agrees, if selected pursuant to the MHA's request for Turnkey proposals, to develop on a Turnkey basis a specified number of public housing units. The public housing units may themselves constitute the total development of the site or be a part of a larger (public/private) development on the site. The owner (or developer with an option that provides control) of the site must also agree to make the site available to the developer whose Turnkey proposal is selected should the proposal by the owner (or developer with an option that provides control) not be selected as a result of the MHA's request for Turnkey proposals.

E. It is further ordered that within ninety (90) days of site preapproval for the 140 units, the City shall cause the MHA to submit site development proposals, pursuant to 24 C.F.R. § 941.404, for the preapproved sites. If the City shall fail to submit site development proposals within the said time period, the plaintiff and plaintiffs-intervenors shall submit same to the Court and to HUD, which, upon approval by the Court, shall satisfy any and all statutory or regulatory requirements in the manner heretofore provided.

F. If Yonkers shall not comply with the directions contained in this Order so that the obligations which are its primary responsibility to designate sites and provide the necessary documentation for the development of the housing units referred to herein devolve on the plaintiffs and plaintiffs-intervenors, the Court may appoint a person expert in such matters to assist the Court and the parties in the preparation of the materials required pursuant to this Order, whose reasonable compensation shall be paid by Yonkers.

V. *Affordable Housing Trust Fund*

The City shall create an Affordable Housing Trust Fund to be administered by the Fair Housing Office in cooperation with HUD and the MHA. The City will initially fund the trust with

not less than 25 percent of the CDBG funds presently allocated by HUD to the City which minimun funding level may be diminished by 5 percent in each of the three succeeding years. In addition, the City will use its best efforts to secure additional funding for the trust fund from other governmental and private sources.

1. These funds will be used to foster the private development of low and moderate income housing by developers who will include 10 percent to 20 percent low and moderate income housing in their proposed development by providing the following incentives:

(i) write down of the site price of City-owned land;

(ii) finance surveys, market analyses and other similar pre-construction costs;

(iii) finance site infrastructure improvements such as sewers;

(iv) interim construction loan financing at below market interest rates;

(v) rental and/or mortgage subsidies to low and moderate income households in such developments; and

(vi) funds to low and moderate income families for rehabilitation.

2. Housing developments will be chosen by the Fair Housing Office to receive trust fund aid in order to advance racial and economic integration.

VI. *Plan for Development of Additional Subsidized Housing*

The City shall develop a Plan for the creation of additional subsidized family housing units (beyond the 200 units provided for in IV, *supra*) in existing residential areas in east and northwest Yonkers. In such Plan, the City shall be free to provide for the

utilization of such private and public funding resources as are available to it including the Affordable Housing Trust Fund. The Plan may provide for units of subsidized housing to be part of a larger development including market rate housing in such ratio (*e.g.*, 80 percent market rate; 20 percent subsidized) as shall be appropriate for the site and proposed development. The City may also provide such units by requiring private developers to construct units of subsidized housing as a condition to obtaining variances or zoning changes, which subsidized units may be on the site in question or on another acceptable site or sites. The City may also provide in its Plan for the purchase and/or lease by MHA of available units in existing private condominiums, cooperatives or rental buildings throughout Yonkers. However, before such units may be included in the Plan, the City must have obtained realistic assurances that the units will in fact be available for this purpose (*e.g.*, the willingness of the seller; approval of cooperative board, if required; acceptable price, etc.). The City shall furnish to the Court and the parties a detailed statement of this Plan by November 15, 1986, which Plan shall contain the following:

(a) number of subsidized units proposed for construction or acquisition;

(b) location of such sites;

(c) rent levels or degree of subsidization;

(d) marketing or rent-up plans;

(e) such other information as shall be necessary or appropriate to enable evaluation of the feasibility of the Plan and the extent to which the construction or acquisition of the units in question will further the integrative goal of this Order.

The parties shall have thirty (30) days thereafter to comment on said Plan, after which time the Court may schedule a

hearing to determine its adequacy in light of the violations and needs found to exist. In the event that the Plan shall be found to be inadequate, the Court reserves all of its rights and powers to make such modifications in the Plan or require such additional action by the City as the circumstances shall warrant.

VII. *Occupancy Priorities*

A. Public Housing

The first priority for occupancy of public housing units made available in east Yonkers shall be given to eligible persons on the existing waiting list for such housing. The Second priority for these units shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of this Court's School Desegregation Order of May 14, 1986.

B. All Other Units

The first priority for occupancy of all other units made available pursuant to this Order in east Yonkers shall be given to families now living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

C. It is anticipated that the City will continue and accelerate its efforts to rehabilitate substandard housing throughout the City, although rehabilitation efforts in southwest Yonkers will not relieve the City from its other obligations hereunder. The first priority for occupancy of rehabilitated units in southwest Yonkers shall be given to eligible families living in east Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

The first priority for occupancy of rehabilitated units in east Yonkers shall be given to eligible families living in southwest Yonkers who have school age children whose attendance at Yonkers public schools will further the integrative objectives of the School Desegregation Order of May 14, 1986.

VIII. *City to Seek Available Financing*

The City shall submit timely and complete applications for CDBG entitlement funds for each program year during the pendency of this Order, including appropriately prepared Housing Assistance Plans, and assurances of compliance with all conditions placed on receipt of such funds. The City shall seek all other available forms of financial assistance from both public and private sources which are currently available or which become available during the pendency of this Order.

IX. *Notice*

The City shall not grant any zoning change or variance or issue a building permit to any private developer with respect to any of the sites referred to in this Order or listed on Exh-NAACP R.H. 16 without furnishing twenty (20) days prior written notice to the United States, the plaintiffs-intervenors and the Court.

X. *Funding*

The City shall provide funding for all of the measures set forth herein. The City shall also provide funding for all of the school desegregation measures required by this Court's Order of May 14, 1986.

The City and its agencies responsible for implementing the remedial Order shall maintain records of all actions taken pursuant to the Order. All such records shall be made available for review by the United States and plaintiffs-intervenors upon reasonable notice.

XI. *Jurisdiction*

This Court shall retain jurisdiction of this matter for five years. At the end of that period, the City may move for the dismissal of this case. Dismissal shall be granted unless, within thirty days from receipt of that motion, the United States or plaintiffs-intervenors object to the dismissal. If such an objection is made with sufficient particularity, the Court shall hold a hearing on the dismissal motion, and the objecting party shall have the burden to demonstrate why the motion should not be granted. If the objecting party fails to carry its burden, the case shall be dismissed with prejudice.

SO ORDERED.

Second Circuit Court of Appeals Opinion

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 832, 833, 834—August Term, 1986

(Argued: February 9, 1987

Decided: December 28, 1987)

Docket Nos. 86-6136, 86-6138, 86-6156

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Plaintiffs-Intervenors-Appellees,

—v.—

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants-Appellants.

* * * * *

CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Third Party, Plaintiffs-Appellants,

—v.—

UNITED STATES DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT; and SECRETARY OF HOUSING AND URBAN DEVELOPMENT,

Third Party, Defendants-Appellees.

Before:

KEARSE, PRATT,* and MINER,

Circuit Judges.

Appeals from a judgment of the United States District Court for the Southern District of New York, Leonard B. Sand, *Judge*, finding the City of Yonkers liable for intentional racial segregation in subsidized housing and public schools, finding the Yonkers Board of Education liable for intentional racial segregation in public schools, *see* 624 F. Supp. 1276 (1985), and ordering, *inter alia*, construction of 200 units of subsidized family housing outside of Southwest Yonkers, *see* 635 F. Supp. 1577 (1986), and desegregation of school system, including a system-wide voluntary magnet school program to be funded by the City and implemented by the Board, *see* 635 F. Supp. 1538 (1986).

Affirmed.

* Judge Winter, originally a member of the panel, subsequently recused himself. Judge Pratt was appointed to the panel pursuant to Local Rule § 0.14(b).

CLINT BOLICK, Washington, D.C. (William Bradford Reynolds, Assistant Attorney General, Walter W. Barnett, Joshua P. Bogin, Marie K. McElderry, United States Department of Justice, Washington, D.C., on the brief), *for Plaintiff-Appellee.*

MICHAEL H. SUSSMAN, Yonkers, New York (Sussman & Sussman, Yonkers, New York, on the brief), *for Plaintiffs-Intervenors-Appellees.*

JOHN H. DUDLEY, JR., Detroit, Michigan (John B. Weaver, Mark T. Nelson, Butzel Long Gust Klein & Van Zile, Detroit, Michigan, on the brief), *for Defendant-Appellant Yonkers Board of Education.*

REX E. LEE, Washington, D.C. (Carter G. Phillips, Mark D. Hopson, Sidley & Austin, Washington, D.C., Gerald S. Hartman, Michael W. Sculnick, Thomas G. Abram, Vedder, Price, Kaufman, Kammholz & Day, New York, New York, Jay B. Hashmall, Corporation Counsel for the City of Yonkers, Yonkers, New York, on the brief), *for Defendants-Appellants-Third-Party-Plaintiffs-Appellants City of Yonkers and Yonkers Community Development Agency.*

M. WILLIAM MUNNO, New York, New York (James F.X. Hiler, Ronald A. Nimkoff, Heidi B. Goldstein, Seward & Kissel, New York, New York, on the brief), *for*

Joseph Galvin, Alfred T. Lamberti, Paul Weintraub, Frank Furgiuele, Joseph M.A. Furgiuele, Jerald Katzenelson and Salvatore Ferdico, and The Crestwood Civic Association, Inc. as Amicus Curiae on Behalf of Defendants-Appellants-Third-Party-Plaintiffs-Appellants.

PUERTO RICAN LEGAL DEFENSE & EDUCATION FUND, INC., New York, New York (Linda Flores, Jose Luis Morin, Kenneth Kimerling, New York, New York, of counsel) *filed a brief for the Organization of Hispanic Parents of Yonkers as Amicus Curiae on Behalf of Plaintiff-Appellee and Plaintiffs-Intervenors-Appellees.*

HENRY MARK HOLZER, Brooklyn, New York (Daniel J. Popeo, George C. Smith, Washington Legal Foundation, Washington, D.C., of counsel) *filed a brief for the Save Yonkers Federation and the Coalition of Concerned Yonkers Citizens on Behalf of Defendants-Appellants-Third-Party-Plaintiffs-Appellants.*

KEARSE, *Circuit Judge*:

Defendants City of Yonkers (the "City"), Yonkers Community Development Agency ("CDA"), and Yonkers Board of Education (the "Board") appeal from a judgment entered in the United States District Court for the

Southern District of New York following a trifurcated bench trial before Leonard B. Sand, *Judge*, holding the City liable for racial segregation of housing in Yonkers, holding both the City and the Board liable for racial segregation of the Yonkers public schools, and ordering each defendant to take steps to remedy the segregation for which it was found liable. The district court held that the City, by its pattern and practice of confining subsidized housing to Southwest Yonkers, had intentionally enhanced racial segregation in housing in Yonkers, in violation of Title VIII of the Civil Rights Act of 1968 ("Title VIII" or the "Fair Housing Act"), 42 U.S.C. § 3601 *et seq.* (1982), and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. The court held that the actions of the Board, including its decisions relating to individual schools, faculty assignments, and special education, and its selective adherence to a neighborhood-school policy in light of the City's segregative housing practices, combined with its failure to implement measures to alleviate school segregation, constituted intentional racial segregation of the Yonkers public schools, in violation of Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000c *et seq.* ("Title IV") and § 2000d *et seq.* ("Title VI") (1982), and the Equal Protection Clause. The court held that the City had contributed to the segregation of the Yonkers public schools by means of, *inter alia*, its segregative housing practices, and that its segregative intent was revealed by the foreseeable effects of its housing practices, its direct involvement with certain schools, and the mayor's appointments to the Board of persons firmly committed to maintaining the segregated state of the schools that both reflected and enhanced the segregated residential patterns. The court thus found the City liable for intentional

racial segregation of the schools in violation of Title IV and the Equal Protection Clause.

To remedy the segregation in housing, the district court ordered principally that the City provide sites for 200 units of public housing in nonminority areas; the order stated that if the City did not identify sites the court would do so. The court ordered that the City reallocate at least a substantial portion of its federal housing grant funds for the next several years to a fund to be used to foster the private development of low- and moderate-income housing in a way designed to advance racial integration.

To remedy the school segregation, the court ordered the Board to take steps toward the desegregation of each school within specified numerical parameters by the 1987-88 school year. To this end, the Board was ordered to create magnet schools and implement a program in which it would assign each student to a school from among those nominated by his or her parents. The court ordered the City to fund the school desegregation plan.

On appeal, the City and the Board raise a variety of objections to the district court's rulings on liability and remedies. The City contends principally that the court (1) improperly imposed an affirmative duty on the City to build public housing outside of the City's predominantly minority neighborhoods; (2) erroneously found (a) that Yonkers's segregated housing patterns were the result of the City's intentional discrimination, and (b) that the City's housing decisions were a cause of school segregation; and (3) improperly considered the mayor's Board appointments in holding the City liable for school segregation. The Board contends principally that (1) the court erred in considering the City's deliberately segregative

housing practices as a factor relevant to the Board's liability for school segregation, and (2) the court's finding of segregative intent on the part of the Board was clearly erroneous.

We conclude that the district court properly applied the appropriate legal principles, that its findings of fact are not clearly erroneous, and that its remedial orders are within the proper bounds of discretion. We therefore affirm the judgment in all respects.

A. BACKGROUND

The present litigation, unique in its conjoined attack on the actions of state and municipal officials with respect to segregation in both schools and housing, brings into question acts, omissions, policies, and practices of the City and the Board of Education over five decades. The case was commenced by the United States in December 1980, with the filing of a complaint alleging, *inter alia*, that the City and CDA had intentionally engaged in a pattern of selecting sites for subsidized housing that perpetuated and aggravated residential racial segregation, and that the City and the Board had, by their intentionally discriminatory acts and omissions, caused and perpetuated racial segregation in the schools. In June 1981, the Yonkers Branch of the National Association for the Advancement of Colored People ("NAACP") and an individual minority student, by her next friend, were allowed to intervene as plaintiffs on behalf of themselves and all others similarly situated, *see* 518 F. Supp. 191, 201-03 (S.D.N.Y. 1981), and the action was subsequently certified as a class action.

Trial on the liability issues was held over a period of some 14 months in 1983 and 1984. During the 90 trial days, evidence was heard from 84 witnesses; depositions of 38 additional witnesses were introduced; and thousands of documents were received in evidence. In November 1985, in an exhaustive and well documented opinion reported at 624 F. Supp. 1276-1553, Judge Sand found the City and CDA liable for housing segregation and found the City and the Board liable for school segregation. Following hearings as to the appropriate remedies for these violations, the court ordered system-wide, comprehensive remedies. *See* Parts *A*.I.C. and *A*.II.G. below.

In view of the challenges made in these appeals to the sufficiency of the evidence to support the district court's findings of intentional discrimination and the contentions that the remedies ordered are overly broad, we summarize at some length the evidence supporting both the findings and the imposition of system-wide remedies.

I. HOUSING SEGREGATION

The City of Yonkers, New York, is a section of Westchester County roughly 4 to 6 miles long by 3 to 3-1/2 miles wide, just north of New York City's Bronx County. For purposes of this suit Yonkers is regarded as consisting of three basic geographic areas, referred to as East Yonkers, Northwest Yonkers, and Southwest Yonkers. Southwest Yonkers, which comprises less than one-quarter of the City's land mass, is the City's most densely populated and urban area. Characterized as containing the "downtown" or "inner city" area, it is the only section having any significant amount of industrialization.

At trial, there was little dispute that, at least as of 1980, when this suit was commenced, the residents of Yonkers were largely segregated by race, with the minorities concentrated in Southwest Yonkers. United States Census figures for 1980 showed that minorities, defined as blacks or hispanics, made up 18.8% of Yonkers's total population; minorities made up 40.4% of the population of Southwest Yonkers but only 5.8% of East and Northwest Yonkers. Southwest Yonkers, while housing only 37.5% of Yonkers's total population, housed 80.7% of Yonkers's minority population.

The minority population of Yonkers grew to 18.8% in 1980 from 2.9% in 1940. During this period, the concentration of minorities in Southwest Yonkers increased as follows:

	Total Minority Percentage	*Minority Percentage of Southwest*	*Minority Percentage Outside of Southwest*
1940.....	2.9	3.5	2.0
1950.....	3.2	4.5	1.6
1960.....	4.5	6.7	2.8
1970.....	10.2	19.8	3.9
1980.....	18.8	40.4	5.8

Concentration has also been evident within the Southwest itself. In 1940, when minorities constituted only 2.9% of Yonkers's total population, two of the 10 census tracts in Southwest Yonkers had minority populations between 10% and 50%. In 1980, when minorities constituted 18.8% of Yonkers's total population, four of the 10 Southwest tracts had minority populations between 20 and 50%, and five had minority populations of more than 50%. A census-tract map showing the 1980 concentrations is attached to this opinion as Appendix A.

Northwest Yonkers and East Yonkers contained 14 census tracts in 1980, divided into 32 sub-tracts. Of the 32, only two had minority populations of 7% or more. One, located in Northwest Yonkers, had a minority population of 28.6%, most of whom lived in a neighborhood abutting a Southwest Yonkers tract that had a minority population of more than 50%. The other, a neighborhood in East Yonkers known as Runyon Heights, had a minority population of 79.8%. Runyon Heights was a middle-income community founded early in the century on a large tract of land owned by a state senator who regularly brought busloads of black residents from Harlem for picnics at which he auctioned off parcels of land to them. Runyon Heights is bounded to the north by a white neighborhood called Homefield. The original deeds for many Homefield properties contained restrictive covenants prohibiting the sale of such properties to minorities, and as Runyon Heights developed, the Homefield Neighborhood Association purchased and maintained a four-foot strip of land as a barrier between the streets of the two neighborhoods. "To this day, Runyon Heights streets terminate in a dead-end just below this strip." 624 F. Supp. at 1410.

The current location of low-income subsidized housing in Yonkers corresponds largely to its concentrations of minority residents. As of 1982, the City had 6,800 units of subsidized housing; of these, 6,566 units, or 96.6%, were located in or adjacent to Southwest Yonkers. A map showing the City's subsidized housing sites is attached to this opinion as Appendix B. Only two subsidized housing projects were not in or adjacent to Southwest Yonkers. One was a family project located in Runyon Heights; the other, also in East Yonkers, was a project for senior

citizens, the majority of whose residents had been expected to be, and were, white. Block-by-block maps for 1950-1980, showing more detail than the census tracts and sub-tracts, revealed that all sites approved by the City for low-income or low-and-middle-income family housing were in or very near neighborhoods that already had high percentages of minority residents.

Given the facts as to Yonkers's segregated housing patterns, most of the trial evidence on housing issues concerned whether the City's subsidized housing decisions bespoke a racially segregative intent.

A. *Evidence as to the City's Subsidized Housing Decisions*

During the pertinent periods, Yonkers's governing body was its City Council ("Council"), comprising the mayor, elected in a City-wide election, and 12 councilmen, each elected by one of the City's 12 wards. The Yonkers Planning Board ("Planning Board") consisted of seven nonpaid citizens appointed by the mayor. The Yonkers Municipal Housing Authority ("MHA"), a public corporation organized in the 1930's pursuant to New York State's Public Housing Law, was the entity authorized to propose, construct, and operate public housing in Yonkers.

Under state law, federal funding could not be requested for a site proposed by MHA until the site was either (1) approved by a majority vote of both the Planning Board and the Council, or (2) approved by at least three-quarters of the Council if less than a majority of the Planning Board approved. According to the testimony of one member of the Council, the opposition of any coun-

cilman to a project proposed for his own ward was routinely honored by the other Council members.

1. *Housing Decisions in 1948-1958*

Prior to 1949, the City had erected two housing projects, both in Southwest Yonkers. The second came about apparently as community leaders' response to concerns expressed in the late 1930's about difficulties blacks were encountering in obtaining decent and affordable housing in the private market. Thus, "the City resolved to build a public housing project 'for Negroes' and set about finding a suitable site on which to do so. . . . Various sites were rejected on the ground that the level of minority concentration there was not sufficiently high, and the site eventually selected in 1940 was in one of the most heavily minority areas of Southwest Yonkers." 624 F. Supp. at 1312.

In 1949, pursuant to the National Housing Act of 1949 ("1949 Housing Act"), ch. 338, 63 Stat. 413 (codified, as amended, at 42 U.S.C. § 1441 *et seq.* (1982)), which provided federal funds for urban renewal, the City applied for the reservation of funds to build 750 units of low-income housing. Its application was approved, but it was not to receive the funds until it had officially designated specific sites and these were approved by the federal Public Housing Administration (a predecessor of the United States Department of Housing and Urban Development (collectively "HUD")). The City's initial deadline for submitting approved sites was August 31, 1950. In February 1950, MHA began proposing sites for the construction of these units.

MHA's first proposed site was a vacant, largely City-owned, parcel of land located in an overwhelmingly white

area of Northwest Yonkers. The City's ownership and the nonuse of the land would have made it a relatively inexpensive building site and avoided any residential displacement and relocation problems. Neighborhood groups, however, swiftly opposed designation of this site, stating that the new housing would be occupied by persons coming from slum areas and that the old slums would continue to exist. The groups recommended clearance of the existing slum areas and the construction of new housing on those sites. The Planning Board rejected MHA's proposed site, citing the parcel's nonconformity with planning standards such as sufficiency of school and shopping facilities.

The next two sites proposed by MHA in 1950 were located in white neighborhoods of Southwest Yonkers. Initially, the councilmen of the two wards in which these sites were located recommended approval. As to one site, however, residents of the area appeared at a Planning Board meeting to express their opposition on the ground that the terrain was irregular and that the presence of such housing would tend to harm property values in the area; their councilman withdrew his support for the project, and the site was not approved. The other proposed site was initially approved by both the Planning Board and the Council. However, when an attempt was made to enlarge the approved area, community groups opposed both the enlargement and the original site designation, principally citing the likely deterioration of property values. Eventually, the councilman from this ward withdrew his support, the Planning Board voted unanimously to disapprove the requested expansion, and MHA abandoned its proposal for even the originally approved project.

By December 1950, the City had approved just one project, to which there had been no community opposition, for 274 units. Its site, previously zoned for industrial use, was in a section of Southwest Yonkers having one of the highest concentrations of minorities.

After all of the other MHA-proposed sites had been rejected, a federal official warned that the City would lose its reservation of funding for the remaining 476 units unless it acted to put additional units into development immediately. The City's response was to expand the previously approved Southwest Yonkers project to 415 units, notwithstanding a prior Planning Board recommendation that no more than 250 units be placed on any site.

In the period 1951 to 1953, MHA proposed 9 more sites for subsidized low-income housing in predominantly white neighborhoods, four in Southwest Yonkers and five in Northwest and East Yonkers. Eight of these proposals prompted vigorous opposition by community civic and social groups, who sent petitions and resolutions to the Planning Board and the councilmen, contending that such projects in their areas would "lead to the eventual deterioration of the surrounding community by the element which they attract." None of MHA's proposed sites was approved by the City.

In the meantime, between 1,200 and 3,000 applications had been received for the 415 units that had been approved. Notwithstanding recognition by the Planning Board and the public of the "desperate need" for additional subsidized housing, no other sites were approved. The City thereby lost allocation of federal funds for the remaining 335 units of its original 750-unit allocation under the 1949 Housing Act.

In 1956, the City was able to renew its reservation of funds for 335 units, and MHA promptly proposed four new sites. One of these was quickly rejected because it was in the path of a proposed highway. The remaining three prompted strong community opposition. Two of these, including one described by HUD as "extremely desirable" for subsidized housing, were in all-white neighborhoods of East Yonkers. The residents of both areas vigorously voiced their opposition at rallies, in petitions, by telegram, and by attending Council meetings in numbers ranging from 400 to 1,000. The City rejected these two sites.

The fourth proposed site was in Runyon Heights, the predominantly black community in East Yonkers. Representatives of the neighborhood opposed the building of low-income housing there on the ground that predominantly white communities had successfully opposed having such projects in their neighborhoods and Runyon Heights should not be the only community in which such a project would be built. They contended that it would be preferable to integrate Runyon Heights into the communities surrounding it and that the placement of low-income housing in Runyon Heights would have the contrary effect of enhancing its racial isolation. The City rejected this site as well.

At least four other sites for low-income housing were formally considered in 1957; none was approved by the City.

In 1958, MHA proposed five sites, four new ones plus one that had previously been rejected because of conflicting highway plans. An MHA official described the sites to the Planning Board as " 'the least objectionable' of those surveyed" but nonetheless predicted that there would be

" 'a lot of objections on the grounds of race or age in certain sites.' " 624 F. Supp. at 1299.

Two of MHA's proposed sites in Southwest Yonkers—one in a predominantly white area, and the other in a predominantly minority area—were disapproved by the Planning Board because they lay in the paths of proposed highways. The Council, however, by a three-fourths vote, overrode the Planning Board's opposition to these two sites; it approved family housing units for the site in the predominantly minority neighborhood and senior citizen units for the site in the predominantly white neighborhood.

The other three sites proposed by MHA in 1958 were approved by the Planning Board. Two of these sites were in overwhelmingly white neighborhoods, one in East Yonkers and described by the City's Planning Director as "ideal" in terms of transportation, shopping, recreation, and schools, and the other in Southwest Yonkers; the third site was in Runyon Heights. All met with opposition from the residents of their respective neighborhoods. From the two white areas, taxpayer and civic groups wrote their councilmen shortly before the Council was to vote, describing their general opposition as follows:

> We personally prefer a public referendum with time to acquaint each and every citizen with the full facts on public housing. Where will these tenants come from? How will we provide schools? How much will it cost us over the years? What safeguards do we have against our having to absorb the overflow from Puerto Rico or Harlem?

The Council voted to reject the sites proposed for the white neighborhoods. It approved the project proposed for Runyon Heights.

Thus, in 1958, the City finally approved sufficient family housing sites to use the remainder of the 750 units that had been allocated to it for 1949. All 750 units were constructed in neighborhoods of high minority concentration; the City had rejected all sites proposed for family housing in any neighborhood not already having a high minority concentration.

2. *Housing Decisions in 1958-1967*

For the next several years, MHA and the City concentrated on finding sites for senior citizen housing. The councilmen and the public equated senior citizen housing with housing for whites, and in fact, few of the residents of Yonkers's senior citizen housing projects have been minorities.

Such housing, so long as not denominated "low-income," was not perceived as being for minorities and met with little or no community opposition. In 1961, for example, the City approved a senior citizen housing site for 300 units in a minority neighborhood of Southwest Yonkers; though the site abutted a predominantly white neighborhood, the only opposition came when expansion of the project was proposed and residents complained of area overcrowding. In 1963, however, when MHA proposed eight senior citizen sites, four in East Yonkers and four in white neighborhoods of Southwest Yonkers, a local news article, headlined "8 Possible Sites Picked for Low-Rent Housing," reported that these locations might also be considered to house families displaced by urban renewal. Public protests followed, including a letter from a community association representing more than 2,000 families expressing concern that "[t]o penetrate the community with subsidized housing would tend to deteriorate

realty values and adversely affect the character of th[e] community." Six of the proposed sites were withdrawn.

In 1964, the City sought federal funds to begin a new stage of urban renewal. When its application was rejected due to its poor record with respect to building subsidized housing for displaced residents, the City began once again to look for suitable sites for family housing. In 1965, MHA proposed eleven sites, including five in East Yonkers or white areas of Southwest Yonkers and four in minority areas of Southwest Yonkers. Protests and petitions were lodged against the five white-area sites on grounds of potential overcrowding and the effect on property values. A news report quoted one resident of East Yonkers as complaining that the City wanted to put in her neighborhood " 'everything [her family had] tried to get away from' " by moving from urban areas to East Yonkers, and another resident as saying " 'it wasn't that she didn't believe in racial or social or economic integration . . . but [that] those people from Yonkers would feel so out of place here . . . it would not be fair to them.' " 624 F. Supp. at 1303. The Planning Director supported the East Yonkers sites; the Planning Board approved only the four sites that were in minority areas of Southwest Yonkers.

These four minority-area sites were then approved by a committee of the Council and one was approved by the Council itself. Before any of the sites could be formally submitted to HUD, however, HUD wrote the City suggesting "scattered sites" instead of site concentration in Southwest Yonkers because "[r]elocation feasibility, even though quantitatively adequate, falls short of acceptability if racial containment will result from the proposed provision of relocation housing." In response, a subcom-

mittee of CDA, the coordinating agency for all of Yonkers's urban renewal projects, compiled a list of 19 sites scattered throughout Yonkers; however, when this list was made public it caused "alarm in the community." According to one news report, at a meeting of Yonkers housing agencies, "fear was expressed by several speakers that the public is not yet ready to accept the federal government's plan for racial and economic integration on a citywide basis." None of the 19 sites was approved.

In 1967, the Council finally approved three sites from among those proposed by MHA in 1965. Despite the Council's awareness of the federal preference for scattered sites, the three sites approved were located in densely occupied, heavily minority sections of Southwest Yonkers. HUD refused to approve the sites.

3. *Housing Decisions in 1968-1974*

During the period 1968 to 1974, the City turned to other federal programs for subsidized housing. CDA sought out private sponsors for a combination of low-and-moderate-income family projects; it focused its efforts solely on sites in Southwest Yonkers.

Proposed sites that were in the Southwest's predominantly white areas drew heated community opposition. Notwithstanding the view expressed by former councilman Edward O'Neill that race played no role in site selections—because " 'nothing was ever expressed for the record to indicate that it did play a role,' " 624 F. Supp. at 1311—several City officials testified that race was a factor. Some stated that their constituents tended to equate low-income housing with minorities. Others "publicly identified the issue before them as being whether the residents of Yonkers were 'ready' for the economic and

racial integration being urged upon the City" by HUD and groups such as the NAACP and the Council of Churches. *Id.* at 1310.

CDA's director, Walter Webdale, testified to his view that the high level of emotionalism exhibited at public meetings indicated that residents were concerned about far more than mechanical matters such as the size of the street or the availability of public utilities, and that "racial considerations d[id] come into play." He gave as an example the reaction to a site proposal for the northern end of Southwest Yonkers which, though just a few blocks from a predominantly minority area, was immediately surrounded by a white neighborhood. A Catholic Church group, led by their pastor, opposed use of this site for family housing and urged that it be used for a senior citizen project instead. The group told Webdale they opposed family housing because they "feared an influx of blacks into the neighborhood."

Another proposed site called Rockledge, located in a predominantly white area of the Southwest, was initially supported by the ward councilman, Dominick Iannacone. Iannacone testified, however, that he received "flack" from his constituents. Some complained about the loss of the proposed site as a parking facility; others, "who knew him better," stated that "they didn't want the housing because they didn't want any blacks there." 624 F. Supp. at 1321. Thereafter, concerned that he would not be reelected if he supported Rockledge, Iannacone withdrew his support, citing his constituents' concern about loss of parking. Using the informal veto power enjoyed by any councilman in whose ward a project was proposed, he "buried" the matter in a Council committee of which he was chairman. At trial, he "acknowledged that his pub-

licly stated reasons for opposing the project were pretextual, and that his opposition in fact was in response to his constituents' racially influenced opposition." *Id.* at 1322.

In the end, CDA's efforts resulted in the construction of eight low-and-moderate-income family projects; all were in Southwest Yonkers and all were in or close to that area's predominantly minority neighborhoods.

Other City activities included consideration in 1969 of subsidized housing for the relocation of 1,000 families from Southwest to other parts of Yonkers; the City's goal was to ensure plant expansion space in Southwest Yonkers for one of the City's largest employers, which threatened to move out of Yonkers. A private consulting firm surveyed 98 possible sites, 76 of which were located in East or Northwest Yonkers. A City Council agenda noted that consideration of sites in nonminority neighborhoods had generated a "great deal of controversy"; neighborhood opposition was expressed by citizens' committees and the presentation of petitions by more than 3,000 residents. Proposals from local businesses for different sites, some "located deep in Yonkers'[s] ghetto areas," prompted "a passionate debate over racism."

Alfred Del Bello, mayor of Yonkers from 1970 to 1974, testified that he abandoned the 98-site survey and focused instead on four sites within a five-block radius of the predominantly minority downtown section of Southwest Yonkers. The State Urban Development Corporation agreed to sponsor these sites despite the known concern of the Planning Board that the locations chosen were inconsistent with the goal of commercial and industrial revitalization of Yonkers; construction was begun without consultation with the Planning Board. Del Bello testified that he had settled on the four sites in minority areas

because he "was dedicated to producing housing, and [he] had to find a political course that would allow us to get it constructed." He stated that "race was definitely a consideration in many of the demonstrations and visible opposition that we had."

In 1971, HUD warned the City that Yonkers would lose millions of dollars in federal funding unless it provided a more balanced distribution of its subsidized family housing. City efforts to find sites acceptable to HUD included some dozen meetings in nonminority neighborhoods. One official described these meetings as chaotic and carrying a pervasive feeling of "strong fear" on the part of the residents; his perception was that "racial" motivations were "very thick in the air."

Eventually, in 1972, the City approved construction of 334 units of subsidized housing on a site that was bordered on the north by a heavily minority area and on all other sides by neighborhoods that were predominantly white. This site was approved over the opposition of residents of the predominantly white neighborhoods, the only minority housing site approved over such opposition. Shortly thereafter, the common view being that the councilman in whose ward that site was located had little chance for reelection, the councilman resigned to take an appointed City position. In 1973, a new mayor, Angelo Martinelli, was elected, having promised during his campaign to impose a moratorium on all subsidized housing in Yonkers. The 334 units approved in 1972 were the last subsidized housing for families constructed in Yonkers.

4. *Housing Decisions in 1974-1982*

In 1974, the Housing and Community Development Act ("1974 Housing Act"), Pub. L. No. 93-383, 88 Stat.

633 (codified, as amended, in scattered sections of 42 U.S.C.), replaced previous federal urban renewal programs. Designed in part to expand housing opportunities for minorities, this statute allowed a community, *inter alia*, to receive certificates (called "Section 8 Certificates") to be distributed to eligible families or individuals who could then choose an apartment in any participating building and have part of the rent subsidized by the federal government. *See* 42 U.S.C. § 1437f. In 1975, the Yonkers Department of Development, an agency formed in 1971 during HUD's pressure for scattered sites for public housing, applied for 100 Section 8 Certificates, 50 for senior citizens and 50 for families. HUD reserved these certificates for the City, pending approval by the Council.

The Council, however, refused to approve use of Section 8 Certificates by families. Two City officials who attended a Council meeting at which the certificates were discussed testified that many councilmen had been "concerned about the possibility that members of the minority community would, in fact, seek and probably find units on the east side of the city."

Accordingly, during the next several years, the City either applied for no Section 8 Certificates for families, or applied for and received family certificates but used few of them, or was denied further certificates because of its nonuse of prior certificates. In 1981, after MHA, at the urging of HUD, applied to HUD for Section 8 Certificates for both families and senior citizens, the Council passed a resolution forbidding MHA to apply for certificates for families. To the extent that the City allowed minority families to use any of the family certificates it had received, it referred those families only to

buildings that were located in Southwest Yonkers; only white families used certificates in East or Northwest Yonkers.

The 1974 Housing Act also allowed a community to receive funds for housing construction. During the period 1974 to 1979, the City built four senior citizen housing projects using such funds. All four were in Southwest Yonkers.

In 1975, an additional senior citizen project was proposed by a private developer for East Yonkers. It was supported by the Planning Board as "well suited for Housing for the Elderly vis-a-vis public transportation, shopping, recreation, etc. as well as its location in the eastern half of the city." The developer, however, had filed a fair housing statement with HUD, expressing his hope to attract elderly blacks and hispanics from Southwest Yonkers and achieve a 20% minority representation in the project. Local residents opposed the project on the ground that it contained the "seeds of a ghetto," and the project was killed by the refusal of the City's Zoning Board to grant minor zoning variances for parking, and by the Council, which criticized the project on the ground—squarely contradicted by the planning experts—that it was unsuitable for senior citizen housing because, *inter alia*, there was an "unsightly car lot" nearby. The project was not built.

In June 1980, HUD advised the City that continued receipt of federal funding would be conditioned on the City's taking "all actions within its control" to construct 100 units of subsidized housing for families "outside of areas of minority concentration." Although the City signed a contract with HUD containing such an undertaking, and several sites were thereafter proposed, no such

housing was built. One such site was disapproved by the Council after receiving the "[c]ustomary community opposition." Three others, out of a list of 14 submitted to HUD by CDA, were tentatively found acceptable by HUD, but their use for low-income housing was thwarted by Council zoning actions. For one site, the Council approved a zoning change so that it eventually became a shopping center instead. For another, the Council refused to approve a zoning change to a category consistent with development as subsidized housing. The third site tentatively approved by HUD was the site of School 4, which had been closed in 1976 and remained vacant, costing the City $40,000 to $50,000 per year in maintenance; this site was already in a zoning category that would permit a housing project. It was also in an area that was 98% white. In 1979, as soon as the School 4 property was mentioned as a possible site for low-income housing, the Council voted to remove it from the multifamily zoning category in order "to 'give the community some peace of mind.' " 624 F. Supp. at 1359.

In 1982, a developer expressed interest in the School 4 site for luxury condominiums priced at more than $100,000. The Council bypassed the Planning Board and took the unprecedented step of creating a citizens' committee, composed of five white residents of the area, to assess proposals for the use of the property. Four of the five committee members had no experience in planning or zoning, and the committee was not advised to consult the Planning Board. The committee recommended the sale because condominiums priced at $100,000 would attract the kind of people "that we would like to live in the neighborhood."

Prior to Council action on the proposed sale, a councilman whose ward was near School 4 wrote his constituents urging them to attend the Council meeting, explaining that the NAACP opposed the sale on the ground that low-income housing should be built instead. At the meeting, a videotape of which is in the record, the predominantly white audience overflowed the room. The discussion was emotionally charged, with frequent references to the effect that subsidized housing would have on the "character" of the neighborhood. The final speaker from the audience, a white proponent of the sale, stated that the Bronx had been ruined when blacks moved there and that he supported the condominium proposal because he did not want the same thing to happen in Yonkers. The audience responded with an ovation. During the discussion that followed, when one councilmember pointed out that the current zoning of the site was inconsistent with the condominium proposal (the Council having, as noted above, removed the site from the multifamily zoning category as soon as it was suggested for low-income housing), another councilmember responded, " 'we will change that zone when the concept fits the people, not before.' " 624 F. Supp. at 1363.

The Council voted 11-2 to sell the site for luxury housing. A majority of those who voted for the sale stated that "the will of the community" should be honored. Consummation of the sale has been delayed pending resolution of this suit.

B. *The District Court's Findings as to Housing*

After an extensive review of the evidence, Judge Sand ruled that, in view of the "consistent and extreme" segregative effect of the City's actions, which catered

consistently to community positions that were in significant part racially motivated, plaintiffs had sustained their burden of proving that the segregated housing pattern in Yonkers had been caused or exacerbated by the City's pattern and practice of discrimination on the basis of race in its decisions on the location of subsidized housing. *Id.* at 1369-73. He found that this pattern had begun with the City's first selection of subsidized housing sites under the 1949 Housing Act and had continued through its 1982 attempt to sell the School 4 property for luxury housing. *Id.* at 1373.

The court rejected each of the City's arguments that persons and factors other than the City had been the cause of Yonkers's segregated housing pattern. It found that the cause was not HUD encouragement of subsidized housing construction in Southwest Yonkers, *id.* at 1328-30; rather, HUD had urged scattered construction sites, and the City had repeatedly risked the loss of federal funding by its refusal to select more widely distributed sites, *e.g.*, *id.* at 1323, 1347, 1356. Nor was the cause a lack of private developer interest in areas outside Southwest Yonkers, *id.* at 1330-31; CDA had sought out developers only for Southwest Yonkers, *id.*, and the City had thwarted the efforts of a developer who sought to build an East Yonkers project intended to attract 20% of its residents from minority groups, *id.* at 1350-51. Nor could the housing patterns be attributed to the desire of minority communities for concentration of subsidized housing in Southwest Yonkers; minority groups had begun at least as early as 1956 to express concern about the segregative effects of locating subsidized housing in heavily minority areas and had expressed a desire to "hav[e] the opportunity to live elsewhere in Yonkers." *Id.* at 1332-33. Nor was

there, as the City contended, a lack of suitable sites in East Yonkers, *id.* at 1333-37; some of the sites rejected by the Council had been considered by the planners to be "ideal," *e.g.*, *id.* at 1300.

The court also rejected the City's argument that its site-selection decisions were made pursuant to a race-neutral "legitimate planning strategy" for urban renewal, *id.* at 1337-42, for the City's site selections, far from revitalizing Southwest Yonkers, had brought revitalization efforts to a halt, *id.* at 1310, 1337. Rather, the court found that whenever a site was proposed for a predominantly white area, strong community opposition emerged. *Id.* at 1369. Though this opposition was not "based *wholly* upon race," race was "a significant factor," *id.* at 1371 (emphasis in original); the opposition was "based, at least in significant part, upon fear of an influx of minorities into what were (and remain today) overwhelmingly white neighborhoods," *id.* at 1313. The court found that "City officials consistently responded to that opposition." *Id.* at 1371. The inference that racial animus was a significant element in the community opposition to which City officials were responding was drawn from, *inter alia*, direct testimony to that effect, evidence of overtly racist comments, the racially divided quality of private housing in Yonkers, and a general pattern in which only sites proposed in the predominantly white Northwest or East Yonkers or the white areas of Southwest Yonkers engendered opposition. *Id.* at 1311-12. The court found that City officials "came to view racially influenced opposition to subsidized housing in East Yonkers as a 'fact of life,' " *id.* at 1316, and made "conscious decisions" to concentrate on " 'politically feasible' " sites, *id.* at 1313. In addition, the court found that "numerous City offi-

cials not only responded to, but, in the words of the campaign literature of some, 'led the fight against subsidized housing in East Yonkers.' " *Id.* at 1373.

The court found further evidence of the City's intent to preserve segregation in housing in its conduct with regard to Section 8 Certificates. Its cut-off of applications for family certificates and its failure to use any already obtained family certificates for minority families outside of Southwest Yonkers were found "inexplicable except by reference to the anticipated race of the certificate holders," *id.* at 1347, *i.e.*, "inexplicable except on the basis of fear that minorities might use the certificates to relocate to East Yonkers," *id.* at 1373. Similarly, with respect to the City's 1982 attempt to sell School 4 for luxury housing, the court found that the procedural innovations and the nature of the debate made it "difficult to imagine a clearer case of an action taken for a discriminatory purpose." *Id.* at 1363; *see also id.* at 1518-21.

In sum, Judge Sand concluded that "the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures to select or support only sites that would preserve existing patterns of racial segregation, and to reject or oppose sites that would threaten existing patterns of segregation." *Id.* at 1373. The court emphasized that its finding of the City's segregative intent rested not on a failure to act, but on "a thirty-year practice of consistently rejecting the integrative alternative in favor of the segregative—a practice that had the unsurprising effect of perfectly preserving, and significantly exacerbating, existing patterns of racial segregation in Yonkers." *Id.* at 1368.

The court concluded that the conduct of the City and CDA violated the Equal Protection Clause and that their conduct since 1968 violated the Fair Housing Act as well.

C. *The Housing Remedy*

Having found the City and CDA liable for statutory and constitutional violations, the court held a six-day hearing as to appropriate remedies. In an order published at 635 F. Supp. 1577 (1986) ("Housing Order") and an unpublished Modification to Housing Remedy Order ("Modification Order"), dated July 8, 1986, the court permanently enjoined the City from, *inter alia*, intentionally promoting racial residential segregation in Yonkers and ordered that certain affirmative steps be taken toward a wider distribution of public housing.

The court noted that the City had already committed itself to providing sites for 200 units of public housing in order to receive its 1983 Community Development Block Grant ("Development Grant") funds but had never fulfilled that commitment; the City also had entered into a Consent Decree with HUD that provided that HUD would reduce Development Grant funding if the City did not submit for preapproval sites for at least 140 of the 200 public housing units. The court ordered the City to submit an acceptable Housing Assistance Plan to HUD and execute a grant agreement with HUD, in order to receive the Development Grant funds for 200 units of subsidized housing, 635 F. Supp. at 1580; Modification Order at 2-4, and to "submit to HUD for preapproval at least two sites for 140 [of the agreed 200] units of family public housing," 635 F. Supp. at 1580.

The Housing Order provided that if the City did not submit two such sites within 30 days of the court's order,

the City would be deemed to have submitted the sites of three closed schools in East Yonkers, *i.e.*, School 4, School 15, and the Walt Whitman School, or such other sites as might be proposed by plaintiffs and approved by the court. Schools 4 and 15, closed in 1976, had been returned to the City in 1982; Walt Whitman had been closed in 1983, and the court ordered the Board of Education to return that school to the City as well. The court also ordered the City to submit sites selected from a specific list for the remaining 60 public housing units. *Id.* at 1581.

In addition, the court ordered the City to create an Affordable Housing Trust Fund for the encouragement of private development of low-and moderate-income housing, to be funded initially with at least 25% of the Development Grant funds allocated to the City by HUD. *Id.* at 1581-82; Modification Order at 1-2. It also ordered the City to establish a Fair Housing Office with prescribed responsibilities, to seek HUD approval for transfer of the administration of the Section 8 Certificate program to MHA, and to develop a plan for more subsidized family housing units in areas outside of Southwest Yonkers. 635 F. Supp. at 1577-82.

II. SCHOOL SEGREGATION

Management and control of the Yonkers school district were entrusted to defendant Yonkers Board of Education. The Board, an independent municipal corporation subject to the control of New York State's Board of Regents and Commissioner of Education, consisted of nine members appointed by the mayor for staggered five-year terms. Its budget was subject to review by the Yonkers City Council.

At the liability trial, plaintiffs sought to show that students in Yonkers schools were segregated and that that segregation had been caused or enhanced principally by (1) the Board's general adherence to a neighborhood-school policy, with awareness of the City's practice of maintaining segregated neighborhoods; (2) other segregative actions of the Board with respect to (a) school openings, closings, and boundary changes, (b) faculty assignments, (c) special education classes, and (d) vocational programs; and (3) the Board's failure to take any of a number of recommended or otherwise appropriate steps to alleviate the growing school segregation.

Plaintiffs contended also that the segregative housing practices of the City were designed in part to achieve and preserve segregation in the schools. They sought to show that the City helped to maintain such school segregation also by, *inter alia*, the mayor's appointing to the Board persons known to advocate preservation of the segregated neighborhoods and neighborhood schools.

A. *Racial Composition of Each School's Student Population*

As of the 1980-81 school year, Yonkers had 23 elementary schools for grades K-5 or K-6; four middle schools for grades 6-8 or 7-8; two combined elementary and middle schools; four general academic high schools; and one vocational high school. In a number of these schools, special education classes were conducted for students with learning disabilities or emotional disturbances.

1. *The General Student Population*

In 1980, the student enrollment in Yonkers public schools was approximately 37% minority. The percentage

of minority enrollment had approximately doubled from 1970 to 1980, due in part to an increase in minority enrollment and in greater part to a decline in white enrollment:

Yonkers Public School Student Population

	White	*% White*	*Minority*	*% Minority*
1967.....	25,875	85	4,421	15
1970.....	25,049	82	5,583	18
1975.....	21,514	72	8,195	28
1980.....	13,840	63	8,023	37

In 1980, only two of Yonkers's schools, one an elementary school located in Southwest and the other a middle school in Northwest, had student populations whose racial compositions approximated that of the system as a whole. The next most balanced schools had student populations that were, respectively, 21%, 45%, and 47% minority. The great majority of the schools were either disproportionately white or disproportionately minority.

At the elementary level, although 61% of the students were white, in 19 of Yonkers's 25 elementary schools the student populations were either more than 80% white or more than 80% minority. Some 85% of Yonkers's minority elementary school students attended nine schools in Southwest Yonkers. In addition, one elementary school in Northwest Yonkers had an 88% minority population. These 10 schools enrolled 92% of all of Yonkers's minority elementary school students. More than 55% of Yonkers's minority elementary school students attended just five Southwest schools, whose minority populations were 75%, 81%, 90%, 98%, and 98%.

Sixteen elementary schools were located outside of Southwest Yonkers. Of these, 14 had student populations that were at least 90% white; more than 70% of

Yonkers's white elementary school students attended these 90%-white schools. Of the 11 elementary schools in East Yonkers, only one had a minority student population of more than 7%.

In Yonkers's middle schools, 62% of the students were white. Two of the six middle schools were located in East Yonkers and together enrolled only 62 minority students, or 5% of Yonkers's total middle school minority population; these two schools were, respectively, 94% and 96% white. Three middle schools were located in Southwest Yonkers and had minority student populations of 62%, 69%, and 94%. Nearly 80% of Yonkers's middle school minority students attended the three Southwest schools. Another 15% attended a middle school in Northwest.

About 70% of the students attending Yonkers public high schools, including the vocational high school (*see* Part *A*.II.A.3. below), were white. Of the four academic high schools, two were located in East Yonkers, one in Southwest, and one in Northwest. The two located in East Yonkers had student populations that were 91% and 98% white. The high school in Southwest had a student body that was 62% minority; it enrolled nearly two-thirds of all Yonkers minority students attending academic high schools.

2. *Special Education Classes*

The Yonkers special education program provided special classes for students with mental or physical handicaps, including those with learning disabilities or emotional disturbances. Beginning in the 1960's, there was a growing and disproportionate number of minority students in special education classes. These classes, especially those for the emotionally disturbed, were viewed by

many teachers, school officials, and community members as a "dumping ground for black children." In general, white children would be placed in a special class only after having been referred first to a school psychologist for an evaluation, then to the principal for review of that evaluation, then to the school district's special education screening committee on the handicapped for a final decision as to what type, if any, special program was appropriate. A black child whose teacher considered him or her "disruptive," however, would often ("for the sake of discipline") be consigned immediately by the teacher and the principal to a class for the emotionally disturbed, without prior reference to a psychologist and with no effort to determine whether other options might meet the child's needs.

As a result, in 1961, when regular classes in Yonkers elementary schools had a system-wide minority population of 10%, minorities made up 22% of the special education classes. By the 1971-72 school year, when the system-wide minority population was 20%, the minority children made up 40% of all special education classes and more than 70% of the classes for those with emotional disturbances.

Location of the special education classes did not follow the Board's usual neighborhood-school policy; rather, these classes were placed in schools that had space available to accommodate them. Since most of the schools with high minority populations tended to be more crowded, most of the available space was found in schools having virtually all-white student populations. The principals of many of the latter schools resisted the placement of special education classes in their schools for reasons that, in the opinion of a former director of the program, were

race-related. Nonetheless, most of the special education classes were placed in schools having few other minority students. In 1972, for example, classes for some 78% of the children classified as emotionally disturbed were conducted in schools whose regular student populations were at least 97% white. Three-quarters of the students in these special classes were minorities.

In most of the schools, there was no mainstreaming of the special education classes into the general school population. Because special education assignments were made without regard to residence, the students were often bused long distances, often well over an hour's trip, and sometimes up to two hours, in each direction. Thus they arrived at school later than the regular students and departed earlier. In some instances they entered the school through separate entrances and were kept in classrooms located in secluded areas of the school. In one school, for example, they had to file down two flights below ground and pass through a boiler room to reach their classroom in the subbasement. Special education students also generally took their lunch, gym classes, and recesses separately from the regular students. To the extent that school officials allowed contact between the two groups, the interaction was often purposely negative. One witness who had been a regular student at a 98%-white elementary school in the late 1960's recalled her perception that all special education students were black and that they were held up to the regular students as examples of "poor, bad behavior." Thus the special education students were perceived as "different" and "bad." Another witness, a parent and PTA president, testified that her children had thought the words "retard" and "nigger" were interchangeable because the children's only knowledge of

blacks was of special education students bused into their school.

Nor was the negative reaction to special education students limited to the school's other students. One of the special education teachers and coordinators testified that parents and community members had thrown rocks at her car and shouted "Take your niggers and get out."

In 1972, the Board hired Dr. Gary Carman, a special education expert, to direct the program. At trial, he testified that Yonkers, by busing its special education students long distances and physically segregating them from the regular student population, "had the most inhumane program for handicapped children [he] had ever seen anywhere." Dr. Carman "knew of no causes, medical causes, social causes, biological causes that could possibly account" for the disproportionate number of minorities placed in the classes for the emotionally disturbed. The disproportionate referral of minority students to special education classes eventually prompted an investigation by state and federal education officials. The conclusion of the United States Department of Education was that the Yonkers special education program subjected minority students to discrimination and violated their civil rights.

From 1972 to 1975, Dr. Carman attempted to improve the special education program by reducing the amount of busing, returning some special education students to regular classes, to an extent mainstreaming the special education students into the general school population, and reducing the incidence of virtually all-minority special classes in virtually all-white schools. After Dr. Carman left in 1975, however, these efforts lapsed and the system reverted to one of long-distance busing and placement of

blocs of minority special education students in virtually all-white schools. Dr. Carman testified that where the total experience of white children with blacks was their exposure to those in special education classes, the white children would view the special education children as "less worthy" and could well "generalize that to all blacks."

3. *Vocational High Schools*

Prior to 1974, Yonkers had two specialized vocational high schools, Saunders Trade and Technical High School ("Saunders"), and the High School of Commerce ("Commerce"). Saunders offered technical courses such as auto mechanics, carpentry, and electricity; Commerce, which was closed in 1974, offered courses such as stenography, bookkeeping, cosmetology, food trades, and dressmaking. Both schools were located in Southwest Yonkers. Neither was subject to the Board's neighborhood policy and each accepted students from anywhere in the City.

Although precise statistics with regard to vocational school enrollment by race are not available for years prior to 1967, the trial testimony indicated that, prior to 1958, Saunders had a large minority enrollment. From the 1930's until approximately 1958, it had a reputation as "a school for problem kids" or for "academically retarded pupils," or as a "dumping ground for minority students." Many black students from Runyon Heights attended Saunders or Commerce instead of Roosevelt, the school nearest their homes, often encouraged by their guidance counselor to do so even if they wanted an academic program. Similar steering usually did not occur with respect to academically undistinguished white students.

In 1958, the Board decided to establish entrance requirements for Saunders and Commerce based on grades, achievement and aptitude test scores, recommendations, and discipline records. The criteria for admission were not precise, however, and final decisions lay within the discretion of the respective principals. Apparently these entrance requirements had the effect of changing the community's perception of the schools as inferior, and by the early 1970's, Saunders, whose capacity was roughly one-half that of the smallest academic high school, was receiving nearly twice as many applications as it could accept.

At the same time, Saunders's minority enrollment was decreasing substantially, due in part to the heightened entrance requirements, the acknowledged inferiority of the educational programs available in Southwest Yonkers schools, the subjectivity of the school officials' evaluation of the applicants' credentials, and the absence of any effort on the part of the Board to see that minority students, most of whom attended schools in Southwest Yonkers, had an equal opportunity to get into Saunders. Robert Alioto, the school system's superintendent from 1971 to 1975, and other school district officials believed that Saunders's selection process " 'appeared to systematically exclude minority youngsters.' " 624 F. Supp. at 1450. The Board, "though aware of the systematic exclusion of minorities which resulted from the Saunders admissions process, did relatively little until the late 1970's to eliminate the discriminatory impact of the methods by which students were chosen." *Id.* at 1452.

B. *Facility and Faculty Disadvantages of the Predominantly Minority Schools*

In support of their contention that Yonkers's segregated school system provided minorities with lower quality education than was given to whites, plaintiffs offered evidence of inferior and generally overcrowded facilities at schools with high minority populations, and of high faculty turnover and a lower overall level of teacher experience in such schools.

1. *Plant Facilities*

School officials testified that adequate facilities at a school are important not only to a student's physical development but also to his ability to benefit from the instructional aspects of the educational process. Inadequate physical facilities, including space for recreation, can cause disciplinary problems and cause the community to perceive the school as inferior. According to Alioto, the Southwest Yonkers schools "had probably the worst facilities that one could imagine."

The predominantly minority schools had smaller buildings and sites, particularly in the amount of playground and recreation areas for each school, than the predominantly white schools. For example, the site size of the five most heavily minority elementary schools averaged 1.83 acres; the average site size of the nine most heavily white elementary schools was 4.84 acres. At the minority schools averaging 1.83 acres, the average school population was 413 students. At the white schools averaging 4.84 acres, the average school population was 308 students.

The three predominantly minority middle schools, all in Southwest Yonkers, were located on property totaling 7.2 acres. The two predominantly white middle schools

located in East Yonkers were on a total of 19 acres. The total number of students attending each group of schools was nearly identical: 1299 in the Southwest schools, and 1312 in the East Yonkers schools. During the 1970's, crowded conditions forced one Southwest middle school to use storage closets as classrooms.

The 62% minority high school in Southwest Yonkers was located on 8.0 acres. The high school in Northwest Yonkers, 47% minority, was located on 6.38 acres. The two high schools in East Yonkers, averaging 95% white student populations, were located on 12.64 and 23.41 acres respectively. A total of some 350 fewer students attended these two East Yonkers schools than attended the Northwest and Southwest schools.

2. *School Staffing*

Educators testified that it is generally desirable for a school to have a balance of experienced and newer teachers on its faculty and for its staff to be relatively stable from year to year. Relatively high rates of turnover and low levels of faculty experience are factors that contribute to a school's lower level of educational effectiveness. The evidence regarding the Yonkers public school system revealed that the predominantly minority schools in Southwest Yonkers had low levels of faculty stability, lower levels of teacher experience than the system-wide average, and produced the students with the lowest academic achievement test scores in the system. These schools also had much higher than average concentrations of minority staff as a result of a Board practice of race-based assignments.

The first minority teachers employed by the Yonkers school system, hired between 1946 and 1950, were as-

signed to School 1, then the only predominantly minority school in the system (91% minority student population in 1950). Until the late 1960's, the system had few minority teachers and no minority principals. The Board then began to recruit minorities, and the number of minority staff members (*i.e.*, teachers, principals, and assistant principals) rose from 95 in 1967 (out of a total of 1416), to 174 by 1975. Consistently over the years, most of the minority staff members were assigned to the schools having the highest percentages of minority students. For example, in the 1967-68 school year, Yonkers had 28 elementary schools; seven of the eight with the highest percentages of minority students were assigned 40% of the minority staff members. In the 1972-73 school year, Yonkers had 30 elementary schools, including six whose student populations were predominantly minority. The Board assigned 61% of its minority staff members to these six schools. In the 1975-76 school year, Yonkers had 31 elementary schools, including nine whose minority student populations ranged from 60% to 98%. These schools enrolled 29% of all elementary students; they were assigned 75% of all elementary level minority teachers.

Similar patterns were evident in the middle and high schools. For example, in the 1972-73 school year, Yonkers had seven middle schools; the three that had the highest percentages of minority students had 34% of the City's total middle school enrollment but were assigned 69% of the Board's middle school minority staff members. In 1975-76, the City had eight middle schools; the four having the highest percentages of minority students, though enrolling only 43% of all middle school students, had assigned to them 81% of all middle school minority teachers.

The Board followed a similar practice in its assignments of minority principals. For example, at the elementary level in the 1973-74 school year, the City had six minority principals; four were assigned to schools whose minority student populations ranged from 68% to 96%. In the 1974-75 and 1975-76 school years, the City had five minority elementary school principals; in 1975-76 it also had one minority assistant principal; all of these persons were assigned to schools having minority student populations of 66% or higher.

While at no time was the faculty of any Yonkers school predominantly staffed by minority teachers, the disproportionate assignment of minority staff to schools having predominantly minority student populations increased the identification of those schools in terms of race. And to the extent that minority teachers were assigned to the virtually all-white schools of East Yonkers it was often to teach the special education classes, which themselves had become known as dumping grounds for minority students. The minority special education teachers "were deliberately assigned to such schools because of the disproportionate number of minority students in Special Education classes." 624 F. Supp. at 1465.

Not surprisingly, in view of the assignment of a disproportionate number of the more recently hired minority teachers to the predominantly minority schools, the average level of teaching experience at those schools was usually lower than the system-wide average. In the year 1967-68, the system-wide average level of teacher experience was 8.45 years. In the elementary schools having minority student enrollments of 40% or higher, the teacher experience level averages ranged from 5.61 to 7.88 years. The only schools whose teachers averaged more

than 10 years in experience were schools having 11% or less minority enrollment, four of which were less than 4% minority.

The disparity in teacher experience levels was aggravated in 1969 when the Board entered into a new collective bargaining agreement with the teachers' union. Notwithstanding the already clear trend of concentration of minority teachers in schools having predominantly minority student bodies, the Board agreed that before assigning any teacher hired from outside the school district to any vacant position within the system, teachers already employed within the system would be given the option, in order of their seniority, of transferring to the vacant position. Thus, as positions became available in East Yonkers schools, the most experienced teachers in Southwest Yonkers schools could, and often did, opt to change schools.

The effects in terms of minority staff concentration, staff turnover, and teacher experience levels were predictable. For example, School 10 was opened in 1972 as a predominantly minority, physically inferior elementary school in Southwest Yonkers (*see* Part *A*.II.E.2. below). Of the original 17 teachers, 15 were white; within two years, 14 had left the school. In the period 1971 to 1975, the total number of minority staff members employed by the City increased from 133 to 174; but in none of the 17 elementary schools having white student populations in excess of 90% did the number of minority teachers increase. Indeed, in 10 of these schools, the number of minority teachers actually declined; and the four schools that had had no minority teachers prior to 1971 still had none.

In 1971-72, when the system-wide average teaching experience was 7.15 years, the average levels of experience at six of the seven elementary schools having minority student enrollments of 40% or higher ranged from 3.33 to 6.19 years. In contrast, only two of the 13 elementary schools having white student enrollments of more than 95% had below-average teacher experience levels; four of the 13 had staffs averaging more than 10 years' experience. The disparity in teaching experience levels was, to an extent, decreased in 1976 when, because of the City's fiscal crisis, the Board laid off 250 teachers, a great number of whom were relatively inexperienced. But even by the school year 1979-80, when the system-wide average was 14.2 years, the average levels at the predominantly minority elementary schools ranged from 9.9 to 13.4 years.

In the 1969 collective bargaining agreement that gave teachers an option to transfer, on the basis of seniority, to vacant positions elsewhere in the system, the Board had reserved the right to compel a teacher to change schools, in certain enumerated circumstances, "when judged to be in the best interest of the school system." The Board never sought to use this provision in order to decrease the concentration of minority teachers in schools with predominantly minority student populations. Indeed, in 1977, the Board agreed to additional limitations on its right to implement involuntary transfers of teachers.

As a result of the Board's race-based assignment practices, the eastward flow of the more senior teachers, and the Board's failure to take any steps to halt that flow or to correct the imbalance of its assignments, by 1980 most of the City's minority staff members were concentrated in one-quarter of the system's 36 schools. Of the City's 25

elementary schools, five that had minority student populations of 75-98% were assigned at least half of the system's elementary level minority teachers; no minority teachers whatever were assigned to five other schools, all of whose white-student enrollments exceeded 92%. Of the City's six middle schools, the three in Southwest Yonkers, which had minority student populations ranging from 62-94% and accounted for 42% of the total number of middle school students in the system, had 62% of the system's middle school minority teachers. Of the five high schools, the two that had the highest minority enrollments (47% and 62%) accounted for 46% of all the high school students in the system but had 77% of the system's high school minority teachers.

C. *The Board's Decisions as to School Closings, Openings, and Attendance Zone Changes*

During the decades on which this litigation focused, the Board made many decisions with regard to opening and closing schools and realigning their attendance zones. Plaintiffs sought to show that many of these decisions evinced an intent to create or maintain segregation in the Yonkers public schools.

1. *Attendance Zone Changes*

Among the attendance zone changes were several affecting Schools 16 and 25, elementary schools located in Northwest Yonkers, less than one mile apart. Between 1953 and 1968, the Board redrew the boundary between these two schools four times. In 1953, School 25 had a minority student population of 4%; that of School 16 was 0%. The 1953 boundary change resulted in the reassignment of 35 white students, and no minority students,

from School 25 to School 16. Ten years later, the minority population of School 25 had risen to 14%; School 16 still had no minority students. A 1963 boundary change resulted in the reassignment of nine white students, and no minority students, from School 25 to School 16. In the following year, a boundary change resulted in the reassignment from School 25 of 23 white students and nine minority students, thereby bringing the minority population of School 16 to 2%. By 1968, Yonkers's system-wide percentage of minority students was about 15%, and School 25 had a minority population of 42%. A boundary change in that year resulted in the reassignment of six of its white students, and no minority students, to School 16. School 16's minority population was 1%.

The Board argued that these changes had been designed to avoid having the reassigned children traverse a steep hill between their homes and school. Board reassignments in other sections of the City, however, had been made though they forced the reassigned students to cope with similar topographical conditions, and in fact two of the boundary changes between School 25 and School 16 made the trip to school harder, not easier, for the students who were reassigned. No other explanation was offered by the Board.

A 1963 attendance zone change between Southwest Yonkers Schools 9 (15% minority) and 12 (42% minority) was similarly unexplained by race-neutral criteria. The attendance zone for School 9 was directly north of that for School 12. In 1963, the Board moved the boundary line farther north. While this change slightly lowered the minority percentage enrolled in School 12, it substantially lowered School 9's 15% minority percentage as it reassigned some 40% of School 9's minority students to

School 12; even prior to the reassignment, School 12 had had the second-highest minority concentration in Yonkers. This boundary change was contraindicated by the relative student-capacities of the two schools. According to the Board's figures, prior to the change, only 77% of the capacity of School 9 was utilized; School 12 was 96% full. The boundary change caused School 12 to be overcrowded.

2. *The Failure To Close or Rezone Longfellow*

The Longfellow Middle School, located in Southwest Yonkers, has long been the Yonkers middle school with the highest percentage of minority students. In 1950, though only 12% of its students were minorities, these students constituted 41% of the City's entire minority middle school population. Housed in a relatively small facility with no outdoor recreational space, by 1969 the school had become underutilized as Burroughs Middle School was opened one mile away and the attendance zone for Longfellow shrank. The drawing of the attendance zone line between Longfellow and Burroughs decreased the number of white students attending Longfellow, and the increasing minority population of Southwest Yonkers led to increasing numbers of minority students. In 1967, Longfellow's student population was 38% minority; after the opening of Burroughs in 1969, Longfellow became 50% minority. By 1973, Longfellow had become 79% minority.

The combination of its disproportionately high minority student population, its inferior physical facilities, and its underutilization caused many education officials and community leaders to urge repeatedly, beginning at least as early as 1967, that Longfellow be closed. The Board

rejected all proposals either to close Longfellow and transfer its students to other schools that were less heavily minority, or to expand Longfellow's attendance zone so as to achieve a desegregative influx of nonminority students. For example, in 1977, when the Board planned to close the nearby Burroughs as a middle school, the Longfellow PTA urged the Board to return to Longfellow the predominantly white area that had been rezoned from Longfellow to Burroughs in 1969; such a realignment would have made use of Longfellow's excess capacity and had a desegregative effect. The Board rejected this suggestion, deciding instead to reassign the Burroughs students—even those who lived within one mile of Longfellow—to Emerson Middle School, two miles away near the northwest corner of the City, or to Whitman Middle School, four miles away near the northeast corner of the City. Though the Board initially reached this decision while an overall school reorganization plan recommending the closing of Longfellow was under consideration, it adhered to the decision after the reorganization plan had been rejected, stating that Longfellow might still be closed.

Other proposals recommended closing Longfellow and reassigning its students to Mark Twain Middle School, located in the southeast corner of East Yonkers, some three miles from the site of Longfellow. The proposal had both fiscal and desegregative merit, for Twain was operating at less than its stated capacity, and it had only a 2% minority population. The Board refused, however, stating that the distance the students would have to travel to reach Twain would be too great and that Longfellow students' parents would not have the ability to carpool their children or pay for the necessary transportation. In

fact, however, many students already within the Twain attendance zone were required to travel some 2-1/2 miles to school, and a one-way distance of some four miles had not deterred the Board from reassigning some Burroughs students to Whitman. Further, though the Board had arranged transportation several times in other circumstances, it made no effort to explore this possibility with respect to the proposed reassignment of Longfellow students to Twain. Finally, the net cost of providing transportation for reassigned Longfellow students would have been relatively low, both because the Board could have saved some $500,000 per year in operating and faculty costs by closing Longfellow, and because under New York law the state would have provided 90% reimbursement for transportation expenses incurred for purposes of school desegregation.

In sum, from the late 1960's, the Board rejected proposal after proposal for the reassignment of more white students to Longfellow or of Longfellow minority students to schools with lower percentages of minorities. It declined to desegregate Longfellow on the ground that the school might be closed; but Longfellow was not closed, even in 1976 when the City's well publicized fiscal crisis required the Board to close several schools. At the time this suit was commenced, Longfellow remained in inferior physical facilities, operated at 31-40% of its capacity, and had a minority population of 94%.

3. *The Opening of Commerce Middle School*

In 1973, in conjunction with the closing of the High School of Commerce, located in Southwest Yonkers a few blocks from the downtown area, the Board opened a new Commerce Middle School ("Commerce Middle"). Its stu-

dent body consisted of junior high school students who theretofore had attended Gorton, a combined junior and senior high school located in the southern part of Northwest Yonkers. The initial enrollment in Commerce Middle was 53% minority.

Prior to deciding on Commerce Middle's attendance zone, the Board had been presented with a number of proposals that would have avoided this creation of yet another predominantly minority school in Southwest Yonkers. These proposals principally involved Emerson, a combined elementary and middle school in Northwest Yonkers located about 1-1/2 miles north of Gorton. Emerson then had a middle school minority population of 8%. One proposal was to assign to Commerce Middle the middle school students from Emerson who lived in the southernmost part of the Emerson attendance zone. There was strong opposition from white residents, however, to any relocation of white students to form an integrated Commerce Middle, opposition that the Board perceived as grounded principally in racial concerns. The Board was also well aware that transferring Gorton students to the proposed new Commerce Middle without reassigning students from any other school would have a distinctly segregative effect: memoranda assessing this alternative noted, "Commerce may become an all-black school"; "Commerce could be all black"; "Commerce becoming basically a black school"; "Racial Distribution—all black." It decided to assign to Commerce Middle no students other than those from Gorton.

It also rejected proposals to reassign the Gorton junior high school students—41% minority—to Emerson instead of to Commerce Middle, a course that apparently was both feasible in terms of Emerson's capacity and

consistent with repeated proposals from school officials and community members to convert Emerson from a combined elementary and middle school to an exclusively middle school. The Board declined to reassign Gorton students to Emerson, on the ground that "tensions" would be created, apparently a reference to racial concerns, for in 1973, one-third of the Emerson's middle school minority students were transferred to Burroughs

> in response to race-related concerns of the Emerson community regarding the presence of minority students at the school. According to [school administration officials], this transfer was effectuated for the purpose of insuring the safety of minority students who had been enrolled at the school in light of altercations which had occurred between students at the school and the Emerson community's opposition to the attendance of minority students at Emerson.

624 F. Supp. at 1481.

After opening Commerce Middle as a 53% minority school in 1973, instead of expanding Commerce Middle's attendance zone northward to draw in any predominantly white neighborhoods, the Board redrew the zone boundary farther south, thereby reassigning to Commerce Middle students from Longfellow and another predominantly minority school. Commerce Middle's minority population thus increased to 70% in 1974 and to 77% in 1975. In 1976, the school was closed as part of the Board's response to the City's fiscal crisis.

4. *Other Board Actions*

Other Board decisions challenged by plaintiffs included the early rezoning and 1954 closing of School 1 in

Runyon Heights, the 1969 opening of the Martin Luther King, Jr., School in Southwest Yonkers, and the fiscal-crisis-related closings of several schools in 1976.

School 1 was located in Runyon Heights, the predominantly black community in East Yonkers. For a time in the 1930's it was attended by students from the Homefield section immediately to the north as well as by students from other largely white neighboring areas; white students then made up one-half to two-thirds of its student population. In 1938, however, the Board redrew the School 1 zone to correspond more precisely with the boundaries of Runyon Heights. Students from Homefield were reassigned to School 22, increasing the distance of their trip but sending them to a virtually all-white school; students south of Runyon Heights were sent to the then-virtually all-white School 5. By 1950, School 1 was 91% minority; at the time of its closing in 1954, it was 99% minority.

As a result of the 1938 rezoning, described by the court as "deliberate, racially motivated gerrymandering, done in a manner which carefully incorporated privately created residential segregation," 624 F. Supp. at 1411, the School 1 zone was the smallest in the City, and the school operated at less than 42% of its capacity. Meanwhile, two nearby virtually all-white schools, Schools 8 and 22, became overcrowded. Runyon Heights community members sought to have the Board expand the School 1 boundaries in order to draw in students from the surrounding areas, thereby decreasing its underutilization, relieving the surrounding schools' overcrowding, and having a desegregative effect on School 1. Instead, in 1954 the Board decided to close School 1 and send its students to Schools 5 and 24, which had a desegregative

effect on those schools. None of the Runyon Heights students were sent to School 22, which remained virtually 100% white, thereby "preserv[ing] an all-white school experience for Homefield students, consistent with the Board's deliberately segregative attendance zone boundary changes of prior years." 624 F. Supp. at 1413.

With respect to the Martin Luther King, Jr., School ("King"), the court found that the initial hope of the Board was, unlike its segregative intent in rezoning School 1, that the opening of King would serve as a significant step toward correcting racial imbalance in the schools of Southwest Yonkers. King was opened in 1969 for grades 4-6 with students reassigned from Schools 6 and 12, both of which were overcrowded and predominantly minority. The population of King at this point was 57% minority. The following year, in accordance with the Board's original plan, students from the predominantly white School 9 were added, thereby decreasing the minority population of King to 49%.

The assignment of children who had attended School 9 prompted a December 1970 petition signed by 434 of their parents to have the Board restore the prior attendance zones. The Board held fast for a year and then relented. In the interim, white students from the School 9 area began to withdraw from King, apparently either relocating or entering private schools, reducing the number of white students at King from 392 in 1970-71 to 224 in 1971-72.

In 1972, School 9 was eliminated as a King feeder school, and third-graders who would otherwise have gone on to King for fourth grade remained at School 9. Some 60% of this group were white. In 1973, King was converted from a grade 4-6 school to a K-5 school; its

students came from the predominantly minority areas previously served by Schools 6 and 12, but not the predominantly white areas of School 9. King's minority enrollment rose from 49% in 1970, to 70% in 1971, to 78% in 1972, to 87% in 1973. By the time of this lawsuit, it had a minority student population of 98%.

Although the district court viewed the consequences of some of the Board's decisions with regard to King as "foreseeably segregative," 624 F. Supp. at 1402, it was unpersuaded, in light of the surrounding circumstances and the Board's initial desegregative intent, that the later decisions of themselves bespoke a segregative intent.

The court explored Board decisions with respect to opening and closing other schools, including those closed in 1976 in response to the City's fiscal crisis. Most of these decisions had some segregative and some desegregative effects and the court was unpersuaded that the decisions themselves demonstrated a Board intent to preserve segregation. Rather, the court concluded that a major indicator of segregative intent was the Board's failure to adopt any proposal or plan to alleviate the segregated patterns its prior actions had achieved.

D. *The Board's Rejection of All Proposals Involving Desegregation*

The first significant official recognition of the need to address the racial imbalance of the Yonkers public schools occurred during the 1968-1970 superintendency of Paul Mitchell, who expressed his concern that the racial segregation of the schools prevented equality in educational opportunity. During his tenure came the opening of King and School 10 (*see* Part *A*.II.E.2. below) in Southwest Yonkers, both of which, though they quickly became

minority schools, had been planned by the Board as racially integrated schools. The Board also conducted a series of human relations workshops and sought the assistance of state education officials in addressing the problem of racial imbalance. Mitchell's successor, Alioto, hired a special consultant to serve as a liaison between school officials and community members, with particular emphasis on communicating the concerns of the minority community to school officials and alleviating the tensions at the racially troubled Gorton School.

Nonetheless, while Alioto recognized the increasing racial imbalance in the schools and the inequality of educational opportunity within the system, particularly with respect to the inadequate facilities and inexperienced teachers that characterized many of the Southwest Yonkers disproportionately minority schools, he and other officials noted that there was strong community opposition to desegregation. For example, the education specialist sent to Yonkers by New York State described a "very hostile audience" at one PTA meeting in East Yonkers and testified that white parents had stated explicitly, " 'We don't want desegregation, I don't want my children going to school with black children.' " Accordingly, Alioto, having instructed his special consultant to gather information on the extent of racial imbalance in the schools, instructed him to cease work in this area because Alioto believed it would be politically infeasible to proceed with desegregative efforts in the schools at that time. The state specialist testified that Alioto informed him that "there was great community resistance and that it was unfeasible to try to develop a desegregation plan and then implement it." A former Board member testified, "There is no question [Alioto] said it and he

said it to many people. He said it could never be sold in the Yonkers community. Any kind of totally city-wide racially balanced program would be politically infeasible."

1. *The NYU Report and the 1973 Reorganization*

In October 1971, the Board commissioned a study of the Yonkers public school system by the New York University ("NYU") School of Education's Center for Educational Research and Field Services. The study team was not asked to address the issue of racial imbalance.

The NYU Report, delivered in 1972, made several recommendations, some of which, though not addressing racial issues directly, had desegregative implications. In this category were recommendations to (1) reorganize all schools into a uniform K-5, 6-8, and 9-12 grade configuration, one facet of which would involve a potentially desegregating school attendance zone change for students from Homefield; and (2) decentralize the vocational education program by (a) closing the High School of Commerce and having a new set of courses offered at Saunders, (b) having two complete sets of the existing vocational courses taught in the academic high schools, one set divided between the two high schools located in the northern part of the City and the other set divided between the two high schools located in the southern part of the City, and (c) allowing a student to take any of the vocational courses taught either in his own school or in the paired school located to the east or west (the "variable access plan").

The NYU Report prompted strong community opposition to any revision of the vocational program that would either cause the predominantly white students from East

Yonkers to have to attend classes in the disproportionately minority high schools in the western half of the City or allow the minority students from the west to attend classes at the 94-97% white high schools in East Yonkers. School officials characterized these objections as reflecting a "[f]ear of racial encro[a]chments."

Two weeks after the last public hearing on the NYU Report, Alioto presented his 1973 Reorganization Plan to the Board. In general, substantially as a result of community opposition to the desegregative facets of the NYU recommendations, the plan included the most segregative proposals that had been made either in the NYU Report itself or in the ensuing alternative suggestions. Thus, the plan adopted the suggestion to decentralize the Saunders vocational programs, but only in part: It rejected the east-west pairing-and-sharing proposal of the NYU Report, and instead incorporated the significantly more expensive approach of duplicating certain of Saunders's vocational courses in each of the four academic high schools. The opening of Commerce Middle as a predominantly minority school, discussed in Part *A*.II.C.3. above, was also part of this proposed 1973 Reorganization Plan. The Board promptly adopted the plan as recommended by the superintendent.

The only potentially desegregating feature of the NYU recommendations that was adopted was that part of the suggestion to standardize the grade configurations which entailed reassigning students from the predominantly white Homefield neighborhood, then attending the overcrowded Roosevelt High School (then 6% minority) in East Yonkers, to the soon-to-be-underutilized Gorton (high school population 24% minority). This recommendation was adopted over opposition of Homefield parents

that school officials inferred was partly race-related. However, the major desegregative effect of even this change was delayed, as in the first year thereafter the Board permitted nearly half of the 132 reassigned Homefield students to remain at Roosevelt; later some Homefield students began using false addresses to avoid having to attend Gorton. In all,

> the evolving segregation of the district's schools remained substantially unaltered. No student movement between the district's regular high schools was effectuated despite the recognition that racial integration would be an advantageous result of the variable access plan. The Saunders facility remained intact despite the realization that the school's physical inadequacies and screening process [were] presently resulting in the inaccessibility of vocational and occupational education opportunities to many minority students. The racially balanced High School of Commerce was closed and was replaced by a predominantly minority middle school. No desegregative reorganizations were effectuated at the elementary school level, as would have occurred under some of the NYU Report proposals.

624 F. Supp. at 1475-76.

2. *Phase II*

A serious official proposal for the desegregation of the Yonkers public schools was made in 1977 by then-superintendent Joseph Robitaille. In late 1975, in response to concerns expressed by the Yonkers NAACP over the increasing racial imbalance in the schools, the Board had established a Task Force for Quality Education ("Task Force") to explore the system's problems,

including declining enrollment, underutilization of school facilities, and fiscal constraints. Announcement of the initial formation of the Task Force omitted any mention that the group would explore racial problems, an omission designed to avoid arousing community hostility. Nonetheless, public resistance quickly materialized, with East Yonkers residents expressing concern that transfer of western Yonkers students into their schools would lead to a decline in educational standards and student achievement and create disciplinary problems; they took the position that the Task Force should be more concerned with improving the schools' overall educational quality than with correcting racial imbalance. Nonetheless, the Task Force's final report, concluding that the Yonkers schools were "racially and ethnically segregated . . . due to segregated housing patterns, socio-economic deprivation, and systematic racism," made a number of remedial recommendations.

In August 1977, Robitaille issued his Phase II School Reorganization Plan, which recognized the interrelationship among the system's fiscal, enrollment, utilization, and racial problems, and incorporated some of the Task Force's recommendations. The principal changes proposed in the Phase II plan were (1) the reorganization of the below-high-school grade configuration to K-6 and 7-8; (2) the closing of three middle schools, Longfellow, Fermi, and Burroughs; (3) the relocation of Saunders to the to-be-vacated Burroughs facility; (4) the closing of Southwest Yonkers's School 6, then 98% minority, and reassignment of its students to underutilized elementary schools to the north, with a view to improving racial balance; and (5) the "Yonkers Plan" for school desegregation. The Yonkers Plan was essentially to limit the size of

each elementary and each middle school, drawing its attendance zone accordingly, and to bus students residing outside the redrawn zone lines to other schools in a pattern that would improve the overall racial balance of the system. It was anticipated that no more than 20% of the students would have to be bused and that the greater efficiencies would result in savings to the City, over a 10-year period, of nearly $29 million.

Phase II in general, and the Yonkers Plan in particular, met with overwhelming community opposition. Many statements from residents of East Yonkers focused on the loss of neighborhood schools, the lack of any planned improvement in the quality of education, and the failure to present possible alternatives to busing, such as the use of magnet schools. Residents of Southwest Yonkers objected to the plan because of the loss of neighborhood schools and because the burdens of traveling to school by bus would be borne disproportionately by the minority students from that area.

Some statements from East Yonkers residents presented explicitly race-related opposition, including flyers protesting the busing of East Yonkers students and busing of "the black children (3,000 in number) to our neighborhood schools"; a letter from a community group that was "unalterably opposed" to "compulsory (non-voluntary) busing for racial purposes as an end in itself"; a letter expressing concern that busing " 'blacks & hispanics' into our east side schools" would be detrimental to the neighborhood, and suggesting that the Task Force be renamed " 'Racist Force us' to take our children and go!"; and a letter from a neighborhood association stating the residents' desire to "preserve the nature of our neighborhoods" and their opposition to "*mov[ing] children* about

for the *sole purpose* of ethnic and racial mixing" (emphasis in original).

Similarly, at community meetings in East Yonkers, school officials were presented with comments expressing concern that the plan would result in Yonkers's becoming "another Bronx," referring to the perceived community deterioration and slum-like conditions that speakers associated with the increase of minority population in that New York City borough. The audience punctuated these and similar statements by local residents with cheers and applause. In contrast, proponents of Phase II were booed and hissed upon introduction, upon mentioning such matters as the inferior books used in Southwest Yonkers schools, and throughout their presentations. One elderly black woman, upon mentioning the prospect of busing students from west to east and stating that children should learn from one another, was booed and shouted at to such an extent that a recess had to be called.

While no explicit racial epithets were used by persons making public statements at the hearings, several trial witnesses testified that community members made specific racial slurs both inside and outside the hearing room, such as, "they are going to send blacks, and they are going to send niggers and they are going to send spicks out here," and "we don't want those children."

Without ever taking a formal vote, the Board unanimously disapproved of all of the desegregative aspects of Phase II. The Yonkers Plan was rejected; School 6 was not closed; Longfellow was not closed; no students were bused.

The stated basis for the rejection of Phase II's desegregative components was the Board's preference for the use

of magnet schools and open enrollment plans for achieving voluntary desegregation. Although it appears that all of the Board members acknowledged that at least some of the community opposition to Phase II was racially motivated, and some believed that racism was the principal basis of that opposition, there was no express discussion by Board members of the race-related community opposition to Phase II except by Quentin Hicks and Anne Bocik, members whose recent appointments to the Board had been extremely controversial, *see* Part *A*.II.E.3. below. Hicks, a black whose appointment had been protested by members of the black community because he did not represent their interests, stated that black parents were concerned about having their children transported out of their neighborhoods into a "white jungle." Bocik, a former principal who had been forced to retire in part because of "her use of racial slurs and other racially insensitive behavior toward minority students," 624 F. Supp. at 1507, stated that minority students and administrators from minority schools "would like to be with their own."

Notwithstanding its stated preference for voluntary methods of desegregation, the Board took no steps to develop or implement any of the desegregative alternatives suggested by its own members or by members of the commmunity. Thus, despite its professed enthusiasm for magnet schools or open enrollment, no magnet school, open enrollment, or other voluntary plan for desegregation was implemented at any time.

As a result, in 1980, the schools of East Yonkers, many of which were operating at less than 60% of their planned capacities, remained predominantly (overall 95%) white in student population, with superior and spacious physi-

cal plants, and experienced faculties. The schools of Southwest Yonkers remained predominantly (overall 67%) minority in student population, some overcrowded and some seriously underutilized, housed in inferior physical facilities, staffed with less-experienced staff members and more than half of the minority teachers employed by the school system, and providing their students with concededly inferior educational opportunities.

E. *The City's Activities With Respect to School Segregation*

In contending that the City as well as the Board should be held liable for segregation in the Yonkers public schools, plaintiffs pointed to, *inter alia*, the interrelationship between housing segregation and school segregation, the City's control over school budgeting and plans, and the mayor's appointments to the Board of persons opposed to desegregative action.

1. *The Interrelationship Between Schools and Housing*

In an effort to refute the contention that its actions in concentrating subsidized low-income housing in Southwest Yonkers had had the effect of enhancing school segregation, the City offered a study that concluded that if none of the subsidized housing projects in Southwest Yonkers had been built and each of the project sites had remained vacant, the racial balance in Southwest Yonkers's schools would not have differed significantly from the actual 1980-81 figures. In contrast, plaintiffs' expert testified that building low-income housing to be occupied principally by minority families tends to create a school that, while not necessarily showing an immediate dramatic increase in minority students, soon becomes

identified as a "minority school." Such an identification encourages resident white families to move out of the neighborhood and discourages other white families from moving in.

The relationship between schools and housing was hardly lost on the City while it was making its various decisions as to whether and where to construct subsidized housing. One Council member testified that nearly all of the East Yonkers councilmen had indicated that their constituents objected to subsidized low-income housing partly because "[i]n order to keep the schools nice, you know, you'd have to keep out the minorities." Further, as described in the previous section, a common theme of East Yonkers residents' opposition to the Yonkers Plan for school desegregation was the desire to "preserve the nature of our neighborhoods." As described in Part *A*.II.E.3. below, Mayor Martinelli explicitly opposed desegregation of the schools by busing in part because it would diminish the stability of the residential patterns.

There was also evidence that City officials had requested that the Board make several school attendance zone changes that would have enhanced segregation at the schools to be affected. For example, in 1974, Martinelli urged that a small nonminority area of a neighborhood be moved from the attendance zone of an elementary school that was 60% minority to one that was 88% white. A few months later a Council member suggested that several predominantly white blocks be redistricted from a school that was 28% minority to one that was 97% white. In 1976, another City official made a similar request at the behest of a landlord who had complained that his ability to attract tenants was detrimentally affected by the location of his property within the zone of a school that had a

substantial minority enrollment. The Board declined to implement any of these requested changes.

2. *City Influence on the Board*

Under state law, the Yonkers school district is fiscally dependent upon the City, and the Board's annual budget is subject to approval, line by line, by the Council. N.Y. Educ. Law § 2576 (McKinney 1981). Because of the Council's fiscal control over the Board, "in the public mind there [were] two boards of education actually operating," with citizens often looking directly to the Council in school matters. There was no evidence, however, that the Council in any particular instance disapproved a school budget that included a desegregation plan; there could be no such evidence because the Board never sought to implement a plan that had any significant desegregative elements.

The Board's willingness to put specific proposals before the Council was not constrained solely by fiscal considerations. For example, in 1973, the superintendent recommended to the Board, and the Board submitted to the Council, recommendations for vocational program modifications that were more expensive than the pairing-and-sharing proposal of the NYU Report. Both the East Yonkers community and a number of Council members had publicly opposed the NYU Report's recommendation. The Board's spurning of the less expensive NYU proposals "was influenced by the perceived infeasibility of obtaining City Council approval." 624 F. Supp. at 1506. Similarly, in the Phase II proposals, the school closings and the state's substantial subsidization of transportation costs would have resulted in a net reduction of the school system's annual expenditures, and fiscal con-

cerns thus could not explain the Board's rejection of those proposals. As a practical matter, however, East Yonkers community opposition to Phase II was strong, Council members and the mayor had publicly expressed their opposition, and the Board always had an eye on what was "politically," not just fiscally, feasible. As one Board official put it, "we, in essence, had to convince another series of people, most of whom were elected by the community, and to the extent that the community resisted the idea, any idea, it seems to me that that would have some impact upon the people who owed election to those same individuals."

The City's influence on the Board was also visible in certain decisions as to school sites and configurations. For example, in the late 1960's the Board commenced plans for School 10, which it intended to open as an integrated elementary school in Southwest Yonkers, drawing students from School 3 (then 34% minority), School 19 (then 68% minority), and School 27 (then 5% minority). Planned as an experiment in the "open school" concept, in which the interior space would be flexible, unstructured, and without walls, the building was to be located on a five-acre site having a general openness of environment harmonious with the openness to be found within. As eventually constructed, however, School 10 was a mean and inadequate ghetto school, due largely to changes urged by the City which the Board grudgingly felt compelled to accept.

Without recounting the many events that occurred en route to the birth of School 10, which are described in detail in the district court's opinion, 624 F. Supp. at 1403-10 and 1542-43, suffice it to say that first, the Board agreed to change its preferred site to one in the middle of

an urban renewal project (in order to allow the City to use the construction of School 10 as a statutorily permitted noncash contribution to the urban renewal area); later it accepted a one-acre site instead of the originally approved five acres (because the City decided to erect additional apartments on part of the site); as the site was developed, the front of the school could not be seen from the street (because the City wanted that frontage for an apartment-retail-store complex); and in the end, the school had virtually no outdoor recreation area (because the City needed more garage space for apartment residents). Though the Board objected to the City's inroads into the School 10 facilities, it eventually capitulated to each demand.

Because of its location behind other buildings and its lack of outdoor play area, School 10 became known as the "airshaft" school and was characterized immediately as a "new ghetto school." By 1980, it had the fourth largest minority percentage enrollment in the City.

3. *The Mayor's Appointments to the Board*

Although the Board was an independent municipal corporation under state law, its nine members were appointed by the mayor. Prior to the election of Mayor Martinelli, many Board members served more than one term, frequently being reappointed by a mayor other than the one who had originally appointed them. In the 25 years just prior to the advent of Martinelli, two-thirds of the Board's 33 members had been reappointed by a successor mayor. In 1973, after HUD had made clear that further federal funds for housing would be withheld unless the City allowed low-income housing to be constructed outside of Southwest, Martinelli won election on

a campaign platform that included a promise that no more subsidized housing would be constructed in Yonkers. Once in office, Martinelli, who opposed busing and favored the policy of neighborhood schools, set out to appoint members "based on his philosophy of education," so that "it would be his Board." He did not reappoint a single person who was serving on the Board at the time he was elected. Many of his appointments were controversial.

His first appointment, in 1974, was Angelo Paradiso, who had been the principal at Saunders from 1964 to 1973. Paradiso had resigned in 1973 after a dispute with Alioto concerning the Saunders screening process and Paradiso's unwillingness to address the problem of disproportionately low numbers of minority students at the school and what Alioto perceived as the systematic exclusion of minorities.

In 1975, Martinelli appointed as Board members Morton Wekstein and Anne Bocik. Wekstein was the Mayor's personal attorney, and his appointment drew criticism in part because Wekstein's law partner was then representing a number of school administrators who had been considered ineffective by Alioto. A year later, Wekstein resigned because of a conflict of interest.

Bocik was a former teacher and elementary school principal who had retired in 1974 after Alioto requested her resignation. As a principal, Bocik had vowed that there would never be a full-time minority teacher of academic subjects in her school; she had received unfavorable job evaluations because of her ineffectiveness in planning and her common use of racial slurs and other racially insensitive behavior toward minority students. Bocik's treatment of minority students in this manner had

been the subject of complaints to school administrators from both minority and white teachers; at trial, one teacher described in detail incidents in which Bocik terrorized or humiliated minority students, used racial epithets in referring to minority children, described them as animalistic, and threatened to "buy bleach, Clorox, Purex to bleach them, their skins, because perhaps that would improve their behavior." Soon after Bocik's forced retirement, a state senator wrote Martinelli, recommending that she be appointed to the Board based on her experience and her Slavic background; her appointment was supported by the United Slavonian American League. It was opposed by the Board's president, by Alioto, and by community members, especially from the minority community. Martinelli appointed Bocik to the Board and defended the appointment by reference to her ethnic background.

The mayor made several appointments in 1976. First, after Wekstein resigned, Martinelli was asked to consider appointing an hispanic to the Board. Notwithstanding his recent justification of the Bocik appointment on grounds of her ethnicity, he responded by stating that his appointment would be "based on the quality of the individual irregardless [*sic*] of racial background." He appointed to the recently vacated seat a white realtor from Northeast Yonkers.

In the same year, the mayor replaced two Board members who had been movers behind the Task Force and were generally regarded as being among the Board's strongest advocates of school desegregation in Yonkers. Both members had expressed their interest in continuing to serve on the Board, and the reappointment of one or both was supported by the Council of PTAs, the Yonkers

NAACP, the new superintendent Robitaille, and the Clergy of Yonkers. Martinelli appointed instead John Romano, a candidate supported by the Congress of Italian-American Organizations, and Joseph Spencer, a supporter of the mayor in his previous election campaigns. Once on the Board, Romano and Spencer promptly voted against even applying for state funding for the Task Force; Romano opined that state funding was a "waste[ ]" because Yonkers has no "racial problem . . . . unless the state hands down a ruling stating there is a problem."

By the time of the 1977 Phase II proposal, Martinelli was routinely quizzing prospective Board members about their views on busing; he admitted at trial that these views "probably weighed very heavily with [him]" in deciding whether or not to appoint. In 1977 and 1978, Martinelli appointed four persons, all of whom were opposed to the Phase II Plan. They included Quentin Hicks, a black opposed to busing, whose appointment was immediately protested by members of the black community on the ground that his views did not represent theirs; the appointment was later acknowledged by the mayor to have been an embarrassment to the black community.

By May 1978, the Board was composed solely of Martinelli's appointees. In that month, the Board held a special workshop at which Board members unanimously expressed their opposition to the desegregation proposals of Phase II. As indicated in part *A*.II.D.2. above, the Board neither accepted any desegregative aspect of these proposals nor took any other steps, including those it avowedly preferred, toward desegregating the Yonkers public schools.

In 1979, Martinelli lost his bid for reelection. In his valedictory State-of-the-City address, he began his description of his administration's achievements in education by stating that "[d]iscussion of neighborhood stability would not be complete without attention to our public school system." After mentioning three factors that he predicted would ensure sound and healthy schools, he stated, "[m]ost importantly, we now have a Board of Education fully committed to neighborhood schools which is of critical importance to neighborhood stability in this city!"

F. *The District Court's Findings as to School Segregation*

The district court found that the Yonkers public school system as a whole was in fact racially segregated, with few of the public schools in Yonkers fairly reflecting the racial balance of the City's overall student population. Using the term "minority" to include both blacks and hispanics, the court found that most schools in the district were either identifiably white or identifiably minority. Most of the schools in Southwest Yonkers had student populations that were predominantly minority, and the community and the Board's administrative personnel generally associated Southwest Yonkers with minority schools. 624 F. Supp. at 1384-87.

School authorities acknowledged that the quality of the education available at the identifiably minority schools was inferior to that available at the identifiably white schools, due in part to the inferior physical facilities and the concentration of less experienced teaching staffs at the former. *Id.* at 1530. The court found that the identifiability of certain Southwest Yonkers schools as minority

schools had become inseparable from the perception of those schools as educationally inferior, and that "[t]his confluence of racial identifiability and relative educational opportunity has served to reinforce the segregative demographic patterns which have evolved in the City." *Id.* at 1444.

The court found that the segregation of the schools was attributable to the conduct of both the Board and the City and that each defendant had acted with the intent to perpetuate or enhance school segregation.

1. *The Board's Liability*

The court found that the Board was well aware of the City's practice of confining subsidized low-income housing to Southwest Yonkers and indeed had urged the City to select scattered sites for such housing. It found that the Board's adherence to a neighborhood-school policy in the face of the City's known segregative practice suggested an intent on the part of the Board to preserve a similar segregation in the schools. *Id.* at 1535-37. It found confirmation of segregative intent in many of the Board's affirmative acts.

The Board's disproportionate assignment of minority teachers and staff members to the predominantly minority schools served to enhance the racial identifiability of those schools as minority schools; the enhanced identifiability had the effect of perpetuating and increasing the predominance of minorities in the student populations of those schools. *Id.* at 1527-28. The staff assignments were not explainable by reference to rationales offered by the Board to explain its assignments of students, for neither the neighborhood-school concept nor concerns for transportation played a role in staff assignments. *Id.* at 1467.

Nor was the court persuaded by the Board's reliance on its agreement with the teachers' union as an explanation for the staffing pattern, first because the racial skewing of the staff assignments predated that agreement, and second because the agreement gave the Board a certain amount of retransfer power that the Board never attempted to use. *Id.* at 1463-67. The court found that

> [t]he foreseeability of the increased racial segregation of staff members and the district's limited efforts to alleviate the imbalance together suggest that the resulting assignment of minority staff to minority schools was a practice which the Board approved of and intended to continue. . . . Given the school district's deliberately segregative pattern of administrative staff assignments and the racial disproportionality in teacher assignments prior to the collective bargaining agreement, it is reasonable to infer that the subsequent pattern of assigning minority teachers to disproportionately minority schools was considered desirable and was deliberately unaltered.

Id. at 1464-65.

The court also found that the Board's special education program, which resulted in the placement of a disproportionate number of minority children in classes for the emotionally disturbed, was "operated in an unlawfully discriminatory manner." *Id.* at 1461. The evaluative process was particularly prone to unwarranted racial assumptions and was unusually discriminatory in its impact. No race-neutral factor was likely to explain the disproportionately high numbers of minority children in such classes, *id.* at 1454, and the discriminatory treatment and the consequent stigmatization of the children so placed

was not educationally justifiable, *id.* at 1461. In addition, the assignment of these disproportionately minority-populated special classes to schools that were predominantly white, and the isolation of and refusal to mainstream the special class students increased the stigmatization. *Id.* at 1455. Minority students enrolled in regular school programs have had difficulty in gaining acceptance among their white schoolmates as a result of the Board's placement of disproportionately minority special education classes in the school. *Id.* at 1456. Even without reference to the special education program, the court noted that a Board study revealed significantly more racial prejudice among students attending schools that were disproportionately black or disproportionately white than among students attending schools that were racially balanced. *Id.* at 1444.

The court also found that many of the Board's actions and inactions with regard to school openings, closings, and attendance zone changes evinced a segregative intent. It found, for example, that the racial imbalance between School 16 (90% white) and the nearby School 25 (88% minority) had been caused in part by the Board's deliberately segregative conduct in repeatedly redrawing the attendance zone boundary between the two schools. It found that the Board's proffer of a race-neutral basis for the rezoning was pretextual. *Id.* at 1526-27.

Though the court was unpersuaded that the isolated act of closing School 1 in 1954—by then 99% minority—evinced a segregative intent, it found that the Board's earlier changes in the attendance zone of School 1, whose student population had theretofore been as much as two-thirds white, had "constituted deliberate, racially moti-

vated gerrymandering" for which there was no evidence of any race-neutral justification. *Id.* at 1411.

The court found that the Board's refusal to close or desegregate Longfellow, the underutilized, inferior middle school with a heavy minority population, was "difficult to explain in race-neutral terms," *id.* at 1426, and found the Board's proffered explanations fiscally unsound, inconsistent with other Board actions, and pretextual. It found that by the late 1970's, racial considerations played an increasing role in the Board's refusal to close the school. *Id.* at 1426-28. It also found that "racial factors played a significant role in the Board's segregative opening of Commerce Middle School." *Id.* at 1482; *see also id.* at 1472-79.

The court found that the Board's rejection of the NYU Report's recommendation of a "variable access" vocational program was designed to be responsive to racial concerns. The community opposition, which argued that any east-west pairing of schools would result in a decline of the quality of education offered at the schools in East Yonkers, took on a pretextual hue in the context of vocational courses. Though test scores indicated a disparity between whites and minorities in achievement levels in academic courses such as English and mathematics, no such disparity was indicated with regard to vocational courses such as auto mechanics. The court found that the Board recognized that community opposition to the pairing-and-sharing proposal stemmed from racial concerns and that the Board's selection of the more expensive alternative of duplicating the vocational courses in each of the four academic high schools reflected a desire not to take steps that would be desegregative. *Id.* at 1476-78.

The court found that the Board's persistent rejection of other desegregative proposals, including those recommended in Phase II and all proposed alternatives that would have had any desegregative effect, was similarly the result of the Board's responsiveness to race-based community resistence to school desegregation. *Id.* at 1497. The court found it significant that the Board did not always yield to public pressures, most notably in connection with its decisions as to what schools to close in connection with the City's fiscal crisis. Thus, when the Board proposed to close Schools 4 (98% white) and 15 (100% white), there was massive protest from the affected communities, from councilmen, and from the mayor. These protests were not construed by the Board as principally race-based, and the Board held firm and closed the schools. *Id.* at 1416-17. Whenever a proposed change was for purposes of desegregation, however, and the pressure was perceived as racially motivated, the Board acquiesced. *Id.* at 1493-94.

The court found several indications that much of the community opposition to busing was race-related and that its phrasing in race-neutral terms was pretextual. For example, East Yonkers parents' emphasis on allowing their own children to attend schools in their neighborhoods and on not usurping after-school recreational time by requiring busing, could not explain their opposition to having Southwest Yonkers children attend schools in East Yonkers. Moreover, the allegedly race-neutral objections would, in many instances, have been equally applicable to the objectors' proposed alternatives such as the formation of magnet schools and open enrollment. The sincerity of their advocacy of magnet schools was further belied by their earlier vehement opposition to the NYU Report's

pairing-and-sharing proposal, which would have effected a limited magnet-school program. All of these factors persuaded the district court that the stated preferences of both the community and the Board for such busing alternatives as magnet schools were pretexts designed to obscure the race-based nature of their opposition to desegregative changes. *Id.* at 1489-90. The court's inference that the Board's own stated preference for such alternatives was pretextual was also drawn from the Board's failure, for more than three years following its rejection of Phase II's desegregative aspects, to take any action whatever to implement any of its allegedly preferred desegregative alternatives. *Id.* at 1493-95.

> In sum, the district court found that the Board's refusal to implement such proposals in the late 1970's occurred in [a] temporal and factual context which renders a finding of deliberate perpetuation of racial segregation appropriate: the increased racial imbalance among the district's schools; the increasingly visible racial opposition to correcting this condition; the increased demands for desegregative action; an increasing realization that such action was an important ingredient in eliminating disparities in educational opportunities in the district; a community increasingly afflicted by segregative governmental housing practices animated by community opposition to the presence of subsidized housing in areas outside of Southwest Yonkers; and the failure to address the problem of racial imbalance in the schools in any meaningful fashion in the years following the rejection of Phase II in a manner consistent with the Board's stated reasons for rejecting the plan. In our view, the record makes clear that the

> initial reluctance to implement desegregative school reorganization plans evolved into a persistent failure to adopt measures to correct recognized educational and racial imbalances in the district in part because of their desegregative consequences. From the foregoing, we find the Board's failure to meaningfully address the problem of racial imbalance subsequent to its consideration of Phase II is more readily explainable as a reflection of the community's resistance to desegregation rather than the race-neutral concerns of the community.

624 F. Supp. at 1497. The court concluded that the conduct of the Board violated the rights of minority school children under Titles IV and VI and the Equal Protection Clause.

2. *The Liability of the City*

The court found that the City's segregative housing practices had been a contributing cause of the racial segregation of the schools. It found that the failure of the Board to take action to minimize the school segregation "in no way negates the fact that, as a factual matter, the City's housing practices contributed to the perpetuation and aggravation of residential segregation and the resulting segregation of the schools." *Id.* at 1501.

The court found that the segregative impact of the City's segregative housing practices on the schools was not unavoidable, unknowing, or inadvertent. It noted that the link between the racial identifiability of a school and the residential segregation of the surrounding neighborhood was recognized by City officials, *id.* at 1443, and found that "in light of the school district's historic neighborhood school policy, the perpetuation and exacer-

bation of racial imbalance in the school district was a natural, probable and actually foreseen consequence of the City's discriminatory housing practices . . . ." *Id.* at 1542. Indeed, in the racially motivated community opposition to the construction of low-income housing in non-minority areas, there was frequent mention of the effect of such housing on schools, and express objection by white parents to having their children schooled with minorities.

Further, the court found that the pattern of appointments by Mayor Martinelli of Board members, screened for their opposition to "busing," was an exercise of "power over school board appointments as a means of furthering the city's segregative objectives." *Id.* at 1534. Though the City was not initially responsible for the Board's neighborhood-school policy, it opposed construction of housing for minorities outside of Southwest Yonkers, and it advocated keeping all children assigned to schools in the neighborhoods in which they lived. Martinelli consistently appointed Board members who shared this view and who steadfastly refused to take any action that would have had any desegregative effect on the schools. Thus, the court found that "the City not only was aware of the overall impact of its subsidized housing practices on Yonkers public schools but also intended to preserve the racially segregative impact of these practices on the schools." *Id.* at 1501.

In all, the court found that the City's segregative housing practices and the mayor's appointments contributed significantly both to the confinement of minority students to schools in Southwest Yonkers and to the Board's failure to undo the segregative effects of these and other practices on the schools. "And in a city where

the segregated condition of 'neighborhood schools' is in part the product of official municipal design, the commitment to the neighborhood school system by the head of that same municipality can hardly be considered race-neutral." *Id.* at 1513.

The court concluded that the conduct of the City in intentionally perpetuating segregation in the schools violated the rights of minority schoolchildren under Title IV and the Equal Protection Clause.

G. *The School Remedy*

After receiving remedy proposals from the parties and conducting an evidentiary hearing, the court issued its school remedy order, reported at 635 F. Supp. 1538 (1986). As an overall goal, the order provided that the Board "shall seek to achieve" desegregation throughout the Yonkers public school system by the 1987-88 school year. To this end, the court ordered the creation of a system of magnet schools that students could choose to attend voluntarily. It defined a "desegregated school" as (a) a magnet school whose minority enrollment was within 15 percentage points of the system-wide proportion of minority students for the first year of that school's operation and within 10 percentage points thereafter, or (b) a nonmagnet school whose minority population was within 20 percentage points of the system-wide proportion.

The court prescribed the methods to be used in administering the magnet school system "[i]n order to maximize the extent to which the integrative goals of this order will be reached through voluntary student assignments." *Id.* at 1544. They included an intense publicity and recruitment phase, *id.*, and a system whereby parents must

submit for each child a list of three school choices, at least one of which must "further the goals of desegregation." *Id.* at 1545. The court also established the admissions criteria to be used in the magnet schools, ordered the Board to "make every effort" to achieve a specified racial composition of teachers at each school, explained the guidelines to be followed in the special education program, and ordered that the Board provide transportation for specified students. *Id.* at 1545-50.

The court ordered the City to provide the necessary funding for implementation of the ordered desegregation program. It appointed a monitor to oversee compliance with its orders and retained jurisdiction of the action in order to enforce compliance. *Id.* at 1551-53.

The court overruled a belated objection by the City that the plan ordered by the court was too expensive. The court noted that the City had made no such objection at the hearing when the desegregation plan budget was presented, had not contended that any part of the proposal was not required for desegregation, and was unable, despite being given an additional opportunity to do so, to show that any part of the desegregation plan budget either was not necessary or was duplicative of the regular budget.

A stay motion was denied, and the desegregation program was commenced in the 1986-87 school year.

B. LIABILITY

In these appeals, the City mounts several challenges to the district court's ruling that it is liable for segregation in housing. Principally it contends that the court erred (1) in ruling, in effect, that it had an obligation to build

subsidized housing outside of Southwest Yonkers; (2) in finding that the City's housing decisions were made with the intention and the effect of perpetuating housing segregation; and (3) in holding the City liable for making decisions that merely responded to the wishes of its citizens.

The City challenges the ruling that it is liable for segregation in the schools, contending principally (1) that the segregation was caused not by City actions but rather by Board policies for which the City may not be held liable; (2) that the record reflects at most the foreseeability that City actions would perpetuate and enhance school segregation, but not any intent on the part of the City to achieve those effects; and (3) that the court could not properly take into account, in assessing City responsibility for school segregation, the mayor's pattern of appointing to the Board individuals who espoused the maintenance of segregation in the schools.

The Board challenges the district court's ruling that it is liable for school segregation on the principal grounds that (1) there was insufficient evidence of its intention to discriminate, and (2) the court could not properly take into account the intentionally segregative conduct of the City in determining whether the Board should be held liable. The Board also contends that "minority" should have been defined to include only blacks, not hispanics, and that with that redefinition, the schools could not be found to be in fact segregated.

As discussed in Part *C.* below, both the City and the Board contend that various aspects of the district court's remedial orders go beyond the proper bounds of discretion.

We have considered all of the arguments made by the City and the Board on these appeals and find all of them to be without merit. Only those mentioned above warrant discussion.

I. GENERAL PRINCIPLES

A. *Substantive Law and the Requirement of Intent*

It is by now well established that in order to prove a claim of discrimination in violation of the Equal Protection Clause a plaintiff must show not only that the state action complained of had a disproportionate or discriminatory impact but also that the defendant acted with the intent to discriminate. This principle governs claims of discrimination in housing, *see Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 265 (1977) ("*Arlington Heights I*"), and claims of segregation in the schools, *see Keyes v. School District No. 1*, 413 U.S. 189, 198 (1973) ("*Keyes*"). *See generally Washington v. Davis*, 426 U.S. 229, 239 (1976).

In order to prevail on an equal protection claim of racial discrimination, the plaintiff need not show that the decisionmaker was motivated solely, primarily, or even predominantly by concerns that were racial:

> [*Washington v.*] *Davis* does not require a plaintiff to prove that the challenged action rested solely on racially discriminatory purposes. Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the "dominant" or "primary" one.

Arlington Heights I, 429 U.S. at 265 (footnote omitted). Rather, the plaintiff need begin only by showing that race was "*a* motivating factor." *Id.* at 266 (emphasis added). Once it is shown that a decision was motivated at least in part by a racially discriminatory purpose, the burden shifts to the defendant to show that the same result would have been reached even without consideration of race. *Id.* at 270 n.21; *Mt. Healthy School District Board of Education v. Doyle*, 429 U.S. 274, 287 (1977). If the defendant comes forward with no such proof or if the trier of fact is unpersuaded that race did not contribute to the outcome of the decision, the equal protection claim is established.

As to a claim under the Fair Housing Act, in contrast, the consensus is that a plaintiff need prove only discriminatory effect, and need not show that the decision complained of was made with discriminatory intent. *See, e.g.*, *Robinson v. 12 Lofts Realty, Inc.*, 610 F.2d 1032, 1036-38 (2d Cir. 1979) (collecting cases):

> "To establish a prima facie case of racial discrimination, the plaintiff need prove no more than that the conduct of the defendant actually or predictably results in racial discrimination; in other words, that it has a discriminatory effect. . . . The plaintiff need make no showing whatsoever that the action resulting in racial discrimination in housing was racially motivated. . . . Effect, and not motivation, is the touchstone, in part because clever men may easily conceal their motivations . . . ."

Id. at 1037 (quoting *United States v. City of Black Jack*, 508 F.2d 1179, 1184-85 (8th Cir. 1974), *cert. denied*, 422 U.S. 1042 (1975)). *See Arlington Heights I*, 429 U.S. 252, 270-71 (ruling that equal protection claim should have

been dismissed for lack of proof of discriminatory intent, but remanding for further consideration of Fair Housing Act claim); *Metropolitan Housing Development Corp. v. Village of Arlington Heights*, 558 F.2d 1283, 1287-90 (7th Cir. 1977) ("*Arlington Heights II*") (holding that Fair Housing Act claim could be established by proof of discriminatory effect, without proof of discriminatory intent), *cert. denied*, 434 U.S. 1025 (1978).

The effect in the present case of the differing standards of proof for the constitutional claim and the Fair Housing Act claim is, as a practical matter, immaterial, for the district court found that even if proof of discriminatory intent were required for establishment of a claim under the statute, the requisite intent was proven. *See* 624 F. Supp. at 1293 n.12 ("In light of the strength of the evidence of intent in the case before us, it is unnecessary to reach the question whether entitlement to the broad remedial measures sought by plaintiffs here could be established under the relaxed 'effects' standard set forth in *Arlington Heights II*."). Since we find no basis for overturning the district court's findings of intent (*see* Parts *B*.II.A.2., *B*.II.B., and *B*.III.B. below), and since the conduct upon which the housing discrimination claim is based spans a period that commenced many years before the 1968 effective date of the Fair Housing Act, we review the statutory claims, along with the constitutional claims, in light of the proof of the City's segregative intent.

B. *Standard of Review*

The standard to be followed by the appellate court in reviewing findings of fact made by the district court is also clear. Fed. R. Civ. P. 52(a) states that those findings,

"whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous." Assessments of the credibility of the witnesses are peculiarly within the province of the district court as trier of fact and are entitled to considerable deference. *Id.* Thus, "when a trial judge's finding is based on his decision to credit the testimony of one of two or more witnesses, each of whom has told a coherent and facially plausible story that is not contradicted by extrinsic evidence, that finding, if not internally inconsistent, can virtually never be clear error." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985). Even when the district court's findings of fact do not rest on credibility determinations but instead are based on documentary evidence or on inferences from other facts, the appellate court must accept those findings if they adopt a permissible view of the evidence; the appellate court may not conduct a *de novo* review. In short, "[w]here there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Id.* at 574; *see United States v. Yellow Cab Co.*, 338 U.S. 338, 342 (1949).

This standard of review governs questions of fact, though not questions of law or mixed questions of fact and law. A finding of discriminatory intent is a finding of fact, *Pullman-Standard v. Swint*, 456 U.S. 273, 287-90 (1982), as are findings of discrimination, *Anderson v. City of Bessemer City*, 470 U.S. at 573, and causation, *e.g.*, *Wellner v. Minnesota State Junior College Board*, 487 F.2d 153, 156 (8th Cir. 1973).

In accordance with the above principles, if the district court's findings as to the existence of segregation in fact, the existence of segregative intent, and the existence of a causal relationship between the two are permissible infer-

ences from the evidence of record, we may not overturn them.

II. The City's Liability For Segregation In Housing

A. *The City's Obligation With Respect to Subsidized Housing*

The Fair Housing Act makes it unlawful

> (a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, *or otherwise make unavailable or deny*, a dwelling to any person because of race, color, religion, sex, or national origin.

42 U.S.C. § 3604(a) (emphasis added). The statute defines "dwelling" as "any building . . . intended for occupancy as[ ] a residence by one or more families, and any vacant land which is offered for sale or lease for the construction or location thereon of any such building . . . ." *Id.* § 3602(b). The City's contention is that neither the Fair Housing Act nor the Equal Protection Clause imposes on it any obligation to construct housing, that it has constructed housing that it has made available to all persons regardless of race, and that the law requires no more of it. In the circumstances of the present case, we disagree.

Though we know of no statutory or constitutional provision that imposes on a municipality a general obligation to construct subsidized housing, *see Acevedo v. Nassau County*, 500 F.2d 1078, 1081-82 (2d Cir. 1974), more focused principles govern the present case. In *Acevedo*, the thrust of the complaint was that the defen-

dant county had initially planned to build both senior citizen and family housing and that its abandonment of the plan to build family housing had a disproportionate impact on minorities. *See id.* at 1081. The district court, after a trial, found that the abandonment had neither discriminatory effect nor a discriminatory motive. *See id.* at 1079-80. Accordingly, we held that the abandonment violated neither the Constitution nor the Fair Housing Act. *See id.* at 1082. This does not mean that we would have reached the same conclusion in the face of findings that there had been discriminatory impact and discriminatory intent, for the absence of a general obligation to construct does not give the municipality license to proceed discriminatorily once it has started down the road to construction. Thus, the Sixth Circuit, for example, has upheld a "pattern and practice" claim under the Fair Housing Act, *see* 42 U.S.C. § 3613(a), where the defendant city had applied for federal funds that it in fact wanted and needed, but had abandoned its application for reasons found to be racially discriminatory. *United States v. City of Parma*, 661 F.2d 562, 575 (6th Cir. 1981), *cert. denied*, 456 U.S. 926 (1982).

Nor, once a municipality has decided to construct housing, may it lawfully proceed with segregative intent and effect to confine housing for minority occupancy to areas in which minority residence is already concentrated, thereby enhancing and perpetuating racial segregation in residential patterns. In *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973), we noted *obiter* that "Congress' desire in providing fair housing throughout the United States was to stem the spread of urban ghettos and to promote open, integrated housing," *id.* at 1034, and that, accordingly, "[a]n authority may not . . .

select sites for projects which will be occupied by non-whites only in areas already heavily concentrated with a high proportion of non-whites," *id.* at 1033. The Third Circuit reached a similar conclusion in *Shannon v. United States Department of Housing and Urban Development*, 436 F.2d 809 (3d Cir. 1970), which involved a challenge to HUD's approval of a rent-subsidy contract for a new building in an urban renewal area of Philadelphia. The thrust of the complaint was that the location of a rent-subsidy project in that area would have the effect of increasing the already high concentration of low-income black residents there, and that HUD had not properly considered the effect of such a subsidy guarantee on the racial concentration in Philadelphia as a whole or in that neighborhood in particular. *Id.* at 811-12. The court of appeals agreed that HUD had not considered those effects, and it vacated the district court's denial of relief, stating that "[i]ncrease or maintenance of racial concentration is prima facie . . . at variance with" the policy underlying the Fair Housing Act. *Id.* at 821. Consistent with these views, when we held in *Acevedo* that there was no constitutional violation in the defendant's decision, made with no discriminatory intent, not to construct housing, we took care to distinguish cases in which municipalities had intentionally pursued their construction plans in a segregative manner, "effectively restrict-[ing] low income housing projects to segregated neighborhoods." *See* 500 F.2d at 1081 n.3.

Accordingly, the district court properly rejected the City's contention that its decisions not to construct minority housing in any virtually all-white area were immune from scrutiny, and appropriately proceeded to determine whether housing in Yonkers was in fact segre-

gated, whether that segregation was caused or enhanced in substantial part by the City's conduct, and whether that conduct was intentionally segregative.

1. *Segregative Effect of the City's Actions*

The district court found that by 1980 an "extreme condition of segregation . . . exist[ed] in Yonkers." 624 F. Supp. at 1364. The evidence amply supports this finding.

The 1980 Census figures showed that 81% of Yonkers's minority residents lived in one quadrant of the City. Minorities constituted 19% of Yonkers's total population; yet the minority population of Southwest Yonkers exceeded 40%. Of the 10 census tracts within Southwest Yonkers itself, five had minority populations exceeding 50%. In contrast, outside of Southwest Yonkers, only 6% of the residents were minorities; and these minority residents were largely confined to two areas, one having a minority population of 29% and the other having a minority population of 80%. In light of these facts, we have no difficulty in upholding the district court's finding that housing in Yonkers was segregated.

Nor do we see a basis for upsetting the finding that the City's decisions to locate low-income housing only in or adjacent to areas already having high concentrations of minority residents was a contributing cause of the extreme condition of residential segregation that existed by 1980. From 1948 to 1980, some 144 sites were formally proposed to the City for subsidized housing, most of them in East or Northwest Yonkers or predominantly white neighborhoods of Southwest. More than 100 other sites, the vast majority of them in East or Northwest Yonkers, were also given official consideration. In all, 23

family housing sites were approved; of these, 21 were in Southwest Yonkers; one was in Northwest, abutting a heavily minority neighborhood of Southwest; and one—the only family project approved for an area that was neither within nor abutting Southwest Yonkers—was in the predominantly black Runyon Heights. *See* Appendix B. Of the 21 family housing sites approved for Southwest, 18 were in or adjacent to neighborhoods already having high minority concentrations, one was a half-block away from such a concentration, and the other two were but five blocks away.

Only one subsidized housing project was approved for a nonminority area outside of Southwest Yonkers: it was not a family project but a senior citizen project which, as expected, was occupied predominantly by white persons. Thus, over a period of more than three decades, the City approved no housing for minorities in any area that was not in or close to an already heavily minority area.

The demographic effect of concentrating minority-intended housing in the already concentrated minority areas was predictable. From 1960 to 1970, while the minority population of East and Northwest Yonkers increased by 1,879 persons, or 61%, the minority population of Southwest Yonkers increased by 10,333, or 5.5 times as many, persons. In percentage terms, the minority population of Southwest increased by 186%, from a starting base that was nearly twice as large as that in East and Northwest Yonkers combined. From 1970 to 1980, when the minority population of East and Northwest Yonkers increased by 43%, the minority population in Southwest Yonkers increased by 87%; in raw numbers, the net increase of minority residents in Southwest Yonkers outpaced the minority increase in other parts of

Yonkers by 13,783 to 2,119. In all, during the period 1960 to 1980, when virtually all of the low-income minority housing at issue here became available for occupancy, all of it confined to areas that already had high minority concentrations, the minority population of Southwest Yonkers increased by 24,116 persons, or 434%, while elsewhere in Yonkers the minority population grew by only 3,998 persons, or 130%.

There was expert testimony that by concentrating subsidized low-income housing in the minority areas of Yonkers, the City had "stigmatized" those neighborhoods and thereby made them both less likely to attract new white families and less likely to retain the white families already there. This is consistent with evidence of denigrating comments made by white residents of other parts of Yonkers about the Southwest Yonkers neighborhoods, and with the demographic statistics. As the minority population in Southwest Yonkers increased from 5,559 in 1960 to 29,675 in 1980, the white population in Southwest declined steeply from 75,952 in 1960, to 66,523 in 1970, and to 41,124 in 1980, a net decrease of nearly 35,000 white residents. Elsewhere in Yonkers, the number of white residents increased from 1960 to 1980 by some 6,000 persons.

Other City acts also served to confine minority residents to predominantly minority areas. For example, in the period 1968 to 1974, when CDA sought out private developers, it focused efforts solely on sites in Southwest Yonkers. In 1975, when a private developer, who had planned a housing project on an East Yonkers site described by City planners as "well suited for Housing for the Elderly," revealed that he hoped to rent 20% of the space to minorities, the City prevented the project. In the

late 1970's, the Council obstructed the potential movement of minority families to existing buildings in East Yonkers by curtailing the use of Section 8 Certificates by families and by steering minority families to buildings in Southwest.

From all the evidence, the court could reasonably infer that the City's actions accelerated and enhanced the process of concentrating minority housing in Southwest Yonkers.

2. *Segregative Intent*

Intent to discriminate may be established in a number of ways. Often it may be "inferred from the totality of the relevant facts, including the fact, if it is true, that the law bears more heavily on one race than another." *Washington v. Davis*, 426 U.S. at 242. Such impact may be an important starting point. Other probative sources may include the "historical background of the decision . . . , particularly if it reveals a series of official actions taken for invidious purposes"; "[t]he specific sequence of events leading up to the challenged decision," such as zoning changes for a given site enacted upon the decisionmaker's learning of plans for the construction there of integrated housing; "contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports"; "[d]epartures from the normal procedural sequence"; and "[s]ubstantive departures . . . , particularly if the factors usually considered important by the decisionmaker strongly favor a decision contrary to the one reached." *Arlington Heights I*, 429 U.S. at 267-68. In the present case, a wealth of evidence in each of these categories supports the district court's finding that the

City intended its housing decisions to result in the confinement of minorities to existing minority areas.

The impact of the City's decisions has been discussed in the preceding section. The historical background of these decisions included the City's 1930's decision to build a housing project especially for blacks, its rejection of a number of sites "on the ground that the level of minority concentration there was not sufficiently high," and its eventual selection in 1940 of a site "in one of the most heavily minority areas of Southwest Yonkers." 624 F. Supp. at 1312.

Many sequential clusters support the proposition that the City's decisions in the ensuing decades were similarly purposely segregative. The most commonly recurring sequence consisted of a site proposal for a white area, followed by vehement community opposition (*e.g.*, letters on behalf of 2,000 residents; 1,000 attending public meetings), followed by City Council disapproval of the site. There was virtually never a site proposal for low-income family housing in a white area that was not met with opposition; there was virtually never white-community opposition that was not followed by withdrawal or rejection of the site.

There was ample evidence that much of the white-area residents' opposition to low-income housing was race-related. Both the Council and the community equated low-income family housing with minorities and senior citizen housing with whites. Thus, a group of white Catholics urged that the housing project proposed for their area be changed from family to senior citizen, stating that they feared an influx of blacks. Virtually all councilmen from East Yonkers stated that they were

concerned about community opposition to low-income housing in their areas; many acknowledged explicitly that that opposition was race related. Iannacone testified that his own facially race-neutral public opposition to a proposed low-income housing project had been pretextual, masking his response to his constituents' racial concerns; some of those constituents had stated, pretextually, that they feared of loss of a parking lot, but others "who knew him better" told him "they didn't want the housing because they didn't want any blacks there." Speakers at meetings, officials at trial, and contemporary news articles reflected the view that many of Yonkers's white residents were opposed to "having to absorb the overflow from Puerto Rico or Harlem," and were "not ready" to accept racial integration. Officials describing public meetings said racial motivations were "definitely a consideration" and were "thick in the air." Councilmen discussing Section 8 Certificates and forbidding MHA to obtain such certificates for family housing exhibited their "concern[ ] about the possibility that members of the minority community would, in fact, seek and probably find units on the east side of the city."

The inference that the City intended to preserve racially segregated neighborhoods was also supported by evidence of its swift zoning obstructions of specific prospects for desegregative construction. For example, as to three sites submitted by CDA and tentatively approved by HUD in 1980, the Council rezoned one site for use as a shopping center; it refused to rezone another to a category consistent with a housing project; and as soon as the third was mentioned as a possibility for low-income housing, the Council rezoned it to remove it from the category appropriate for a housing project, in order "to give the commu-

nity some peace of mind." The Council indicated that it would rezone the site to the original category to permit luxury housing but not minority housing, stating, "we will change that zone when the concept fits the people, not before."

The record also reflects numerous instances in which the City deviated from its normal procedural sequences or ignored the usual substantive standards in order to place low-income housing in Southwest Yonkers or to prevent its construction in East Yonkers. For example, in the 1950's the City constructed 415 units of low-income housing on a minority-area site though the Planning Board recommended a limit of 250 units; the City rejected every site recommendation from the Planning Board, even those the planning experts rated as superlatively suitable, if the site was in a virtually all-white neighborhood. In the 1970's, when Planning Board opposition to further low-income housing construction in Southwest Yonkers was known, the City simply began construction there without consulting that body. In the 1980's, when the Council wished to have the School 4 site used for luxury housing rather than for low-income housing, it again bypassed the Planning Board and, in an unprecedented move, appointed a five-person advisory committee, four members of which had no planning or zoning experience; their major qualification appears to have been that they were white residents of the School 4 area.

Finally, the City's intent to preserve the existing racial imbalance between Southwest and other areas of Yonkers was made clear by the words and actions of Mayor Martinelli. In 1971, HUD had warned the City that in order to retain federal funding, the City would have to build minority housing in nonminority neighborhoods.

Thereafter, Martinelli won election on a campaign platform that included the promise of no more subsidized family housing in Yonkers. He was true to his word, and no more such housing was built. He further sought to ensure the preservation of the predominantly white neighborhoods by appointing school board members who would not approve busing, stating that "a Board of Education fully committed to neighborhood schools . . . is of critical importance to neighborhood stability . . . ."

Neither this summary nor our more detailed summary in Part *A*.I.A. recounts all of the evidence that supports the district court's finding that the City's housing decisions were intentionally segregative. Given even that fraction of the proof recited here as to the impact of the City's decisions, the sequences of events, the procedural deviations, the convenient disregard of substantive standards, and the explicit and veiled statements of racial concerns, we regard as frivolous the City's contention that the evidence is insufficient to support the district court's finding that the City made its subsidized housing decisions with a segregative purpose.

B. *The City's Responsiveness to the Racial Animus of its Citizens*

Finally, the City argues that it is entitled to judgment in its favor on the housing discrimination claim because its housing decisions only responded to the concerns of its citizens, and race was not found to be the citizens' "dominant" concern. We reject this argument on factual, procedural, and doctrinal grounds.

First, we note that the City's factual premise—that City officials themselves displayed no race-related concerns but merely sought to follow the wishes of their

constituents—is contradicted by the district court's findings and by the record. Although the City argues that the district court found

> that "officials . . . were *entirely* well-meaning public servants acting in accordance with their perception of what was feasible in the political and socio-economic circumstances of Yonkers and *in the best interests of that community*,"

and argues that "[t]hus, the Court below expressly found that the public officials themselves lacked *any racial animus* in any of the housing decisions reviewed by the Court," (City brief on appeal at 34, quoting 624 F. Supp. at 1289 (emphasis and ellipsis in City's brief)), the City's view of the facts and the findings is untenable, for it is plainly contradicted by the district court's well documented opinion. To begin with, the quoted passage, which appears in a brief introductory portion of the court's opinion, is preceded by the word "[m]any"; the district court stated that "[m]any officials" were entirely well meaning, not that all officials were well meaning. Further, the rest of the opinion makes clear that by "well-meaning" and "in the best interests of the community," the district court was giving recognition to the view of certain officials that "racially influenced opposition to subsidized housing in East Yonkers [w]as a 'fact of life,' " 624 F. Supp. at 1316, and their position that they had made "conscious decisions" to concentrate on " 'politically feasible' " sites, *id.* at 1313, *i.e.*, sites that could be approved without incurring race-based opposition. Most importantly, although the court found that the City's actions consistently responded to the racial concerns of white community members, it did not find that City leaders had no racial concerns of their own. To the

contrary, it found that "numerous City officials not only responded to, but . . . 'led the fight against subsidized housing in East Yonkers.' " 624 F. Supp. at 1373.

The record amply supports the finding that many City officials were leaders, not mere puppets, of their constituencies. Thus, on several occasions, the mayor or councilmen exhorted their constituents to action. For example, a councilman whose ward was near the School 4 area sent letters to all of his constituents, urging them to support the sale of the property for luxury housing and defeat "the wishes of the NAACP" for low-income housing. Similarly, with regard to another site proposed to HUD in 1980, then-mayor Gerald Loehr sent a mass mailing to residents of the area, taking the position that the low-income housing would place an "unacceptable burden" on the neighborhood and urging the residents to respond. Nor did the City confine its segregative actions to the simple disapproval of housing sites whose proposal provoked white residents' opposition. The actions of Martinelli in packing the Board with opponents of busing in order, in his words, to preserve "neighborhood stability," the refusal of the Council to approve use of Section 8 Certificates by families, and the Council's eventual order to MHA not even to apply for Section 8 Certificates lest "members of the minority community . . . seek and probably find units on the east side of the city," provided further confirmation for the finding that in the fight to preserve segregation in housing, the Council was not just a reactive body.

Second, even if we were to accept the City's legal premise—that the City could not be held liable for the racially segregative impact of its decisions made in response to the concerns of the citizenry unless race were

found to be the citizens' "dominant" concern—we would not order the entry of judgment in favor of the City. The district court did not find that race was *not* the protesting citizens' dominant concern in their opposition to low-income housing. It found that race was a "significant" factor. Neither this finding nor the finding that race was not the sole factor is inconsistent with a hypothesis that race was their dominant concern; and since a finding that race was the dominant factor would not have been clearly erroneous, the best the City could gain on this appeal, assuming our acceptance of its factual and legal premises, would be a remand for the district court to make additional findings.

Finally, we reject the City's doctrinal contention that elected officials may lawfully act with the purpose of achieving or preserving racial segregation in response to the urgings of their constituents so long as race is "only" a significant, but not a dominant, factor in the constituents' motivation. Even assuming, contrary to the findings and record in the present case, that the actions of the municipal officials are only responsive rather than leading the fight against desegregation, we conclude that the Equal Protection Clause does not permit such actions where racial animus is a significant factor in the community position to which the city is responding. *See, e.g., Palmore v. Sidoti*, 466 U.S. 429, 433 (1984); *Smith v. Town of Clarkton*, 682 F.2d 1055, 1063-66 (4th Cir. 1982); *Dailey v. City of Lawton*, 425 F.2d 1037, 1039 (10th Cir. 1970); *United States v. City of Birmingham*, 538 F. Supp. 819 (E.D. Mich. 1982) ("*City of Birmingham*"), *aff'd as modified*, 727 F.2d 560 (6th Cir. 1984); *cf. City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 448

(1985) ("*Cleburne Living Center*"); *Lucas v. Colorado General Assembly*, 377 U.S. 713, 736-37 (1964).

The Supreme Court has long held, in a variety of circumstances, that a governmental body may not escape liability under the Equal Protection Clause merely because its discriminatory action was undertaken in response to the desires of a majority of its citizens. In *Palmore v. Sidoti*, the Court overturned a state court judgment that divested a natural mother of the custody of her infant child because of her remarriage to a person of a different race. The Court noted that community biases might subject the child to undesirable stresses that could be avoided if the child lived with parents of her own race, but it ruled that the state, although having a substantial interest in the welfare of the child, could not lawfully remove the child from the custody of her natural mother in order to cater to the racial biases of its constituents. Noting that this was by no means the first occasion on which it had struck down a law that responded to popular racial prejudice, and pointing to its invalidation of laws in areas such as housing in *Buchanan v. Warley*, 245 U.S. 60, 81 (1917), the Court stated as follows: "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect. 'Public officials sworn to uphold the Constitution may not avoid a constitutional duty by bowing to the hypothetical effects of private racial prejudice that they assume to be both widely and deeply held.' " 466 U.S. at 433 (quoting *Palmer v. Thompson*, 403 U.S. 217, 260-61 (1971) (White, *J.*, dissenting)).

In *Lucas v. Colorado General Assembly*, the Court invalidated a discriminatory legislative apportionment plan that had been expressly approved by the electorate,

stating that "[a] citizen's constitutional rights can hardly be infringed simply because a majority of the people choose that [they] be." 377 U.S. at 736-37 (footnote omitted). In *Cleburne Living Center*, the Court held that a city requirement that a permit be obtained for use of a dwelling as a home for mentally retarded persons, where no permit requirement was imposed with respect to similar types of uses for such dwellings, violated the Equal Protection Clause in light of the city's inability to articulate a legitimate governmental purpose to which the permit requirement was rationally related. The Court rejected the notion that the city was entitled to adopt such a requirement in response to the prejudices of residents of the neighborhood in which the home was to be located:

> It is plain that the electorate as a whole, whether by referendum or otherwise, could not order city action violative of the Equal Protection Clause, . . . and the city may not avoid the strictures of that Clause by deferring to the wishes or objections of some fraction of the body politic. "Private biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect."

473 U.S. at 448 (citation omitted) (quoting *Palmore v. Sidoti*, 466 U.S. at 433).

The circuit courts have applied these principles in the context of challenges to segregation in both schools and housing, ruling that discriminatory action is not lawful simply because it was taken in response to the racially motivated opposition of a segment of the community. In *City of Birmingham*, for example, the district court ruled that a city was liable for its obstruction of a racially integrated housing project even though six of the seven

members of the decision-making body in fact favored the project, and that body's impedance of the project was simply responsive to the racial animus of a majority of its virtually all-white community:

> The government need not prove that the [decision-making body] itself intended to discriminate on the basis of race in order to establish that the City acted with a racially discriminatory intent. In order to demonstrate a city's racially discriminatory intent, it is sufficient to show that the decision-making body acted for the sole purpose of effectuating the desires of private citizens, that racial considerations were a motivating factor behind those desires, and that members of the decision-making body were aware of the motivations of the private citizen[s]. *United States v. City of Blackjack, Missouri*, 508 F.2d [at 1185 n.3]. Any other rule of law would permit a legislative body to place its official stamp of approval on private racial discrimination.

538 F. Supp. at 828. The Sixth Circuit affirmed the district court's judgment that the actions of the decision-maker had been racially motivated, quoting the lower court's findings that unlawful racial motivation was properly inferred from, among other things, " 'the views expressed by a significant number of opponents of [the low-income housing project] (uttered both on the public record and within the hearing of those who testified at trial),' " and a decision-making body " 'that knowingly pursued policies that appeased those who expressed these bigoted views.' " 727 F.2d at 564 (quoting 538 F. Supp. at 826).

In *Smith v. Town of Clarkton*, a town was found liable under the Equal Protection Clause and the Fair Housing

Act for withdrawing from a joint plan to construct low-income housing, where its withdrawal was a response to town residents' opposition that was "motivated in significant part by racial considerations." 682 F.2d at 1063 (citing district court's findings of fact). Though there was no evidence that the town officials themselves had a history of racially discriminatory acts or that in their individual capacities they were racially motivated, the circuit court upheld the imposition of liability, stating that "[i]t is not necessary, in proving a violation of the equal protection clause, to show that the challenged actions rested *solely* on a racially-discriminatory intent in order to demonstrate that the involved officials acted with an intent to illegally discriminate," *id.* at 1066 (emphasis in original), and concluding that there could be "no doubt that the defendants knew that a significant portion of the public opposition was racially inspired, and their public acts were a direct response to that opposition," *id.*

Other circuits have reached the same conclusion. *See Dailey v. City of Lawton*, 425 F.2d at 1039 (holding city liable for refusing zoning change to permit minority housing project in white area "because of the opposition to the project by the residents of" the white area); *Gautreaux v. Chicago Housing Authority*, 436 F.2d 306, 307-08, 313 (7th Cir. 1970) (holding city council's delay in submission to HUD of low-income housing sites proposed for predominantly white neighborhoods not justifiable by the fact that it was responsive to "political considerations and community hostility"), *cert. denied*, 402 U.S. 922 (1971); *Resident Advisory Board v. Rizzo*, 564 F.2d 126, 144 (3d Cir. 1977) (inferring improper racial motivation from city's "sudden shift in . . . position from passive acceptance [of low-income housing project]

to active opposition, in the face of protests by demonstrators manifesting racial bias") (footnote omitted), *cert. denied*, 435 U.S. 908 (1978); *Hoots v. Pennsylvania*, 672 F.2d 1107, 1115 (3d Cir.) (holding that " '[s]chool authorities may not, consistent with the Fourteenth Amendment, maintain segregated schools or permit educational choices contributing to the development and growth of segregated schools *because of community sentiment or the wishes of a majority of voters*' " (quoting district court opinion in *Hoots* reported at 359 F. Supp. 807, 822 (W.D. Pa. 1973) (emphasis in Third Circuit opinion)), *cert. denied*, 459 U.S. 824 (1982).

We do not read these cases to imply, as the City would have us do, that if invidious discrimination is a significant factor in the community position but is not the dominant factor, the municipality is permitted to cater to that prejudice with impunity. Just as many concerns inform a given legislative decision, making it difficult to pinpoint a single or dominant factor that motivates a legislative body, it may be equally difficult to isolate as "dominant" a motive shared by a given segment of the populace at large. It is sufficient to sustain a racial discrimination claim if it has been found, and there is evidence to support the finding, that racial animus was a significant factor in the position taken by the persons to whose position the official decision-maker is knowingly responsive. Given the district court's finding, which is unimpeachable on the basis of the present record, that racial animus was a significant factor motivating those white residents who opposed the location of low-income housing in their predominantly white neighborhoods, the City may properly be held liable for the segregative effects of a decision to cater to this "will of the people."

III. The Liability of the Board and the City For Segregation in the Schools

Each of the defendants contends that the district court erred in holding it responsible for the segregated state of the Yonkers public schools. In essence, each seeks to place the responsibility on the other, the Board contending that it simply adhered to a neighborhood-school policy and cannot be held liable because any segregation in the schools is the result of segregated residential patterns for which it is not responsible, and the City contending that all responsibility for school configurations rests on the Board and that the court could not properly take into account the mayor's filling the Board with persons devoted to preserving the racial imbalance in the schools. Each defendant challenges the district court's findings that it took, or failed to take, certain actions with segregative intent. We conclude that the evidence supports each of the district court's findings, as well as its conclusion that both the Board and the City are liable for school segregation.

A. *The Definition of Minorities*

Preliminarily, the Board contends that the district court erred in defining "minorities" to include hispanics as well as blacks, and argues that if only blacks had been considered, the court would not have found that the Yonkers public schools were in fact segregated. This contention need not detain us long.

The census data for the earliest periods covered by this suit defined minorities to include blacks and dark-skinned hispanics, and for the latter decades defined minorities to include blacks and all hispanics. School records kept by the Board set forth statistics in terms of "Black," "His-

panic," and "Other." The opposition of white citizens to the placement of low-income housing in their neighborhoods and to the busing of Southwest Yonkers school children into East Yonkers was directed toward both groups. Many protests specified opposition to blacks and hispanics in these precise terms, or in pairs of derogatory epithets, or in dual geographic terms. In all the circumstances, it would have been error for the district court to omit hispanics from the minority category in its analysis of whether the Yonkers public school system was segregated. *See Keyes v. School District No. 1*, 413 U.S. at 197-98; *Hart v. Community School Board of Education*, 512 F.2d 37, 45 n.10 (2d Cir. 1975).

B. *Sufficiency of the Evidence of the Board's Intent to Preserve School Segregation*

As discussed in Part *B*.II.A.2. above, official intent to discriminate may be inferred from evidence of such facts as the segregative impact of the decision, historical background, specific sequences of events, departures from the normal procedural or substantive standards, contemporary statements by members of the decision-making body, and the totality of the circumstances. *See Arlington Heights I*, 429 U.S. at 266-68. The foreseeability of a segregative effect, or "[a]dherence to a particular policy or practice, 'with full knowledge of the predictable effects of such adherence upon racial imbalance,' " is a factor that may be taken into account in determining whether acts were undertaken with segregative intent. *Columbus Board of Education v. Penick*, 443 U.S. 449, 465 (1979) (quoting district court opinion therein, 429 F. Supp. 229, 255 (S.D. Ohio 1977)).

Applying these principles in the context of equal protection challenges to school segregation, the courts have found, for example, that a city's decision, from among several options, to create a school attendance zone that results in a school whose student population is very heavily minority is evidence from which an intent to segregate may be inferred. *See, e.g., Arthur v. Nyquist*, 573 F.2d 134, 144 (2d Cir.), *cert. denied*, 439 U.S. 860 (1978). Further, "[i]ndependent of student assignment, where it is possible to identify a 'white school' or a 'Negro school' simply by reference to the racial composition of teachers and staff, the quality of school buildings and equipment, or the organization of sports activities, a *prima facie* case of violation of substantive constitutional rights under the Equal Protection Clause is shown." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1, 18 (1971); *see also Green v. County School Board*, 391 U.S. 430, 435 (1968). Other factors from which an intent to create or perpetuate segregated schools may be inferred include adherence to discriminatory admission policies in the city's vocational schools, *see, e.g., Arthur v. Nyquist*, 573 F.2d at 144, the use of attendance zone policies that rigidly require attendance of minority students at minority schools while giving nonminority students options to attend schools that are predominantly white, *e.g., Oliver v. Michigan State Board of Education*, 508 F.2d 178, 183-84 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975), and the implementation of attendance zone changes having a foreeseeably segregative effect, together with an intentional failure to take any corrective action, *see Hart v. Community School Board of Education*, 512 F.2d at 46-48.

In the present case, the district court's finding of segregative intent on the part of the Board is supported by the evidence of (1) the segregative impact of its decisions and the foreseeability of that impact, (2) the discriminatory nature of certain of its affirmative acts, which included segregation-enhancing school zone realignments, race-based staff assignments, race-based placement of minorities in special classes and prejudice-enhancing treatment of those classes, race-based decisions on school openings and closings, and systematic exclusion of minorities from vocational programs, and (3) the Board's failure, in deliberate responsiveness to the race-based opposition of some segments of the community, to implement any step that would have been desegregative.

Little need be said to show the segregated condition of the Yonkers public schools. Among Yonkers's 25 elementary schools in 1980, in which 61% of all students were white, more than three-quarters of the schools were either more than 80% minority or more than 80% white; 92% of the minority students attended just 10 of the schools. Seventy percent of Yonkers's white elementary students attended 14 schools outside of Southwest Yonkers, whose student populations ranged from 90% to 99% white. The distribution of students by race at the middle and high school levels was not dissimilar. Ninety-five percent of the middle school minority students were concentrated in four of the six middle schools. In the City's academic high schools, 92% of the minority students were concentrated in two of the four schools.

At each level, all but one of the schools having very high percentages of minority students were located in Southwest Yonkers, which housed 81% of Yonkers's minority residents; the lone exception at each level was

located in Northwest Yonkers, a small segment of which had a 29% minority population. In East Yonkers, which housed less than 6% of Yonkers's minority residents, no school at any level, other than one elementary school attended by students from Runyon Heights, had more than a 9% minority student enrollment; in the other elementary schools, the minority population ranged from 1% to 7%. The Board attributes the segregated school patterns to the City's segregated residential patterns, and, arguing that it merely adhered to a neighborhood-school policy, it contends that it was not responsible for school segregation that reflected housing patterns. This position is superficial and untenable, both because the Board's adherence to a neighborhood-school policy has helped to increase the concentrations of minority residents in certain neighborhoods and because adherence to that policy is hardly the only premise of the Board's liability.

It is, of course, plain that housing patterns have an impact upon school populations and that when a school board adopts a policy of requiring children to attend schools in their own neighborhoods, the racial makeup of a school's population will normally be reflective of the makeup of its neighborhood. The neighborhood-school policy itself, however, has an effect on residential patterns, for parents of school-age children are often influenced by the quality of the nearby public schools in deciding where to reside. Thus, the neighborhood-school policy may result in identifiably minority schools in neighborhoods having high concentrations of minority residents; such identifiability, especially if it is perceived that the quality of the education available in those schools is inferior, often dissuades nonminority persons from moving into the neighborhood or from remaining there;

and the election of nonminorities to live elsewhere increases both the minority proportion of the neighborhood's population and the identifiability of its schools as minority schools. As the Supreme Court has put it, "[p]eople gravitate toward school facilities, just as schools are located in response to the needs of people. The location of schools may thus influence the patterns of residential development of a metropolitan area and have important impact on composition of inner-city neighborhoods. . . . [C]hoices in this respect have been used as a potent weapon for creating or maintaining a state-segregated school system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 20-21 (discussing selection of sites for school construction). Thus a neighborhood-school "policy does more than simply influence the short-run composition of the student body of a new school. It may well promote segregated residential patterns which, when combined with 'neighborhood zoning,' further lock the school system into the mold of separation of the races." *Id.* at 21.

We think it clear that the district court correctly found that it was foreseeable to the Board that adherence to its neighborhood-school policy would further lock the Yonkers school system into its segregated patterns. Plainly the Board was aware over the years of the increasing percentages of minorities attending many of the schools in Southwest Yonkers; it was also aware of the declining attendance at those schools by white students. The changes in racial balance of the student populations contributed to the increasing identifiability of certain schools as minority schools, each thereby promoting and speeding the identifiability of its neighborhood as one that was predominantly or wholly minority. Thus, the

district court was justified in finding that the very adherence by the Board to a neighborhood-school policy where the housing patterns were segregated had a spiral effect, serving to promote and enhance school segregation beyond the segregated levels existing when the policy was first adopted. Certainly where the City advocated adherence to a neighborhood-school policy in order to preserve the existing segregated residential patterns—as was explicitly stated by Martinelli in extolling the Board he had filled with carefully screened appointees who would adhere to that policy—the Board may not validly argue that that adherence exonerates it from liability for the segregation in the schools resulting from the segregation in housing that it has helped to preserve.

In the present case, of course, the intent of the Board to preserve segregated schools was inferrable not just from the foreseeably increasingly segregative effect of its neighborhood-school policy but also from the facts that (1) its adherence to that policy was selective, the consistent element being that deviations or manipulations tended to increase the racial imbalance in the schools, (2) it made other decisions and followed other practices that further increased the racial identifiability of certain schools or promoted racial discrimination, and (3) it consistently rejected, often stating reasons that were pretextual, any significantly desegregative alternative proposed to it.

Specific deviations or manipulations included the Board's redrawing of school attendance lines. For example, the attendance lines for School 1, theretofore one-half to two-thirds white, were altered at both the north and the south ends of the zone to exclude virtually all of the white students and reassign them to virtually all-white

than 5% of Yonkers's total population, created a school whose student population was 99% black. The changes were not dictated by any race-neutral considerations: School 1 became woefully underutilized; two of the nearby white schools, including one to which white students were reassigned, were already overcrowded; and the distance to be traveled by some of the reassigned students was increased. Though the School 1 manipulations had no discernible lingering effect on school patterns by 1980, the school having been closed in 1954, the "careful[ ]" and "deliberate, racially motivated gerrymandering," 624 F. Supp. at 1411, contributed to a historical background showing segregative intent on the part of the Board.

The Board also several times altered the attendance zone lines between School 16 and School 25, which did have a lasting segregative effect. On each occasion white students were reassigned to School 16, and usually only white students were reassigned. At all times, School 16, to which the white students were reassigned, had either no, or a minuscule percentage of, minority students. By the time of this suit, School 25, from which the white students were transferred, was 88% minority; School 16, less than a mile away, remained 90% white.

The Board's major system-wide deviations from the neighborhood-school policy applied to special education classes and vocational schools. The special education classes for emotionally disturbed children were viewed as a dumping ground for minority children; they were three-quarters filled with minorities, a proportion that was unexplainable on a race-neutral basis; these classes were generally staffed with minority teachers assigned because of their race; the classes were bused long distances to predominantly white schools where they were carefully

separated from the regular school population for all phases of the school day activities. Pointed to by school officials as examples of bad behavior, these special education students were despised by the impressionable young white students and their parents. An expert formerly employed by the Board testified that white students of the regular school programs would likely generalize their contempt for black special education education students to all blacks. He testified that the Yonkers program was the most inhumane program for handicapped children he had seen anywhere. During his tenure, some of the worst facets of the program were discontinued; upon his departure some were resumed.

In the area of vocational training, the Board's discriminatory practices went from one extreme to the other. Prior to the 1960's, Saunders too had a reputation as a dumping ground for minority students. Minority students were often encouraged to enroll in Saunders even when they preferred an academic program. In the early 1960's the community perception of the school changed due to the Board's introduction of entrance requirements; Saunders received a surfeit of applications and, applying some academic criteria that students from the inferior Southwest schools perhaps could not meet and some subjective criteria that they did not meet, Saunders officials began to admit a disproportionately small number of minority students. Board officials acknowledged that the new selection process " 'appeared to systematically exclude minority youngsters.' "

In the academic schools, the Board's racially discriminatory staff assignment practices enhanced the racial identifiability of most schools. When the Board began to hire minority teachers in the late 1940's, it assigned most

of them to the more than 91% minority school in Runyon Heights and the rest to other schools with substantial minority enrollments. In the decades that followed, the Board continued to assign most of its minority teachers and minority principals to schools that had high percentages of minority students. These discriminatory assignments, combined with the repeated exercise by nonminority teachers of their seniority rights to transfer from the predominantly minority schools in favor of the predominantly white schools, caused the predominantly minority schools to be staffed by less experienced teachers. This fact, plus others such as the lack of a system-wide standardization of teaching materials and the vastly more skimpy and crowded physical facilities of the predominantly minority schools (as the superintendent said, "probably the worst facilities that one could imagine"), contributed both to the fact that those schools were educationally inferior to East Yonkers's predominantly white schools and to the community recognition that this was so.

One concededly inferior and identifiably minority middle school was Longfellow, which community members repeatedly urged the Board to close or rezone. The school had long been disproportionately minority, enrolling 41% of all of Yonkers's middle school minority students as early as 1950. As early as 1967, the PTA urged that it be closed. Through the years, the Board kept it open, declining, even while closing other schools in response to the City's fiscal crisis, to close Longfellow (which would have saved some $500,000) and to send its predominantly minority students to an underutilized school that was virtually all white. When Burroughs was closed in 1978, Longfellow could have been made substantially less segre-

gated by retransferring to Longfellow a predominantly white area taken from Longfellow's zone in 1969. Instead, the Board gave students from those areas the option of attending Emerson or Whitman, both predominantly white. In 1980, Longfellow remained open, an inferior and underutilized school whose minority population was 94%.

In opening Commerce Middle in 1973, though explicitly recognizing that reassigning students from Emerson, in addition to those from Gorton, to Commerce Middle was the only hope for the latter to avoid becoming an all minority school, the Board assigned Commerce Middle only Gorton students. Thereafter, it expanded the Commerce Middle attendance zone to incorporate additional predominantly minority areas. By the time Commerce Middle was closed in 1976, its minority population was 77%.

The district court permissibly inferred discriminatory intent on the part of the Board from the plainly and foreseeably segregative effects of these acts and practices and from the fact that many of its proffered rationales were pretextual. For example, though the Board claimed that the eastward flow of the experienced white teachers resulted from a collective bargaining agreement provision that gave them a transfer right, that agreement also gave the Board latitude to retransfer some teachers in the best interests of the school system; the Board never sought to invoke its right. Though the Board rationalized the redrawing of the attendance line between Schools 16 and 25 on the ground that it was intended to make the trip to school easier for the reassigned children, two of the four zone changes in fact made the trip more difficult. Similarly, though the Board rationalized its refusal to reassign

Longfellow students to Twain partly on the ground that the trip for the reassigned students would be nearly three miles, some Twain students already had nearly that distance to travel, and the Board simultaneously allowed predominantly white Burroughs students to attend a predominantly white school that caused them an even longer trip. The Board also rationalized the refusal to send Longfellow students to Twain on the basis that transportation would be too costly; yet the state would have been required by law to subsidize 90% of that cost; even unsubsidized, the cost would have been a tiny fraction of the $500,000 per year that would have been saved by the closing of Longfellow. The Board's proffered rationale for rejecting the Phase II proposal for busing students to achieve desegregation was twice-belied. Though the Board stated that it disapproved of busing because it preferred such alternatives as the creation of magnet schools, (a) it never implemented any such alternatives, and (b) in fact it had earlier rejected a proposal for the limited use of magnet schools for vocational programs. Such a stream of pretextual rationales made a substantial contribution to the fund of evidence from which the Board's intention to preserve segregated schools was reasonably inferrable.

Finally, it is rather plain that in failing to adopt any desegregative measures the Board was, at least in part, bowing to the will of the City and of white community members who opposed desegregation. Cooperation with the views of the City was often evident. The Council, of course, had fiscal control of the Board's operations, with the power to approve or disapprove the school budget line by line. Both the mayor and the councilmen often publicly expressed their views of proposals under consider-

ation by the Board; school officials generally refrained from pursuing courses that they thought would spark race-based opposition; and in submitting budgets to the Council even before the advent of Martinelli, the Board eschewed desegregative proposals that it thought would be politically infeasible in light of community and Council opposition. After Martinelli saturated the Board with members who would not vote for "busing," the Board unanimously rejected each desegregative aspect of the Phase II proposals and implemented no desegregative alternatives, not even those they stated they preferred.

The Board argues here that the court was wrong to find an intent to preserve segregation, because the Board merely followed the wishes of the populace, and popular opposition to desegregative proposals was merely an opposition to busing, not to desegregation. Any suggestion that public opposition was not race-based or that the racial nature of the opposition was unknown to the Board is, on the record before us, entirely frivolous. Hostile white audiences from at least the early 1970's through Phase II told state and local school officials *in haec verba* that they did not want their children going to school with minority children. Thus, as early as 1971, the Board's superintendent abandoned even the gathering of information on the schools' racial imbalance on the ground that "any kind of totally city-wide racially balanced program would be politically infeasible." The NYU pairing-and-sharing proposal for Saunders's vocational programs, which would have had a desegregative effect, was rejected by the superintendent and the Board because of opposition by councilmen who had openly declared themselves against the proposal and community opposition that school officials recognized as "fear of racial encro[a]ch-

ments." When the Task Force was formed in 1975, the Board's announcement carefully refrained from mentioning the racial issues to be explored, in hopes of averting immediate community opposition. The opposition nonetheless was quickly forthcoming, raucous and strident, much of it in the form of letters and flyers expressing opposition explicitly on racial grounds.

To the extent that community opposition was not stated in explicitly racial terms but rather invoked race-neutral explanations, the evidence easily permitted the court's inference that these explanations often were pretextual. The stated opposition to the NYU-proposed exchanges of students between East Yonkers and Southwest Yonkers on the ground of a desire to preserve the superior achievement levels of the East Yonkers students had little applicability in the context of vocational programs, for there was no indicated disparity in achievement in those fields. And though East Yonkers parents stated that they opposed busing on the ground that it would usurp too much of their children's before-and-after-school time, that time cost could not explain their at least equally vehement opposition to the busing of Southwest Yonkers children into East Yonkers. The finding that the emphasis on busing was partially pretextual was further supported by the evidence that white-area residents opposing the placement of low-income housing nearby complained that having minority housing in their neighborhoods would result (obviously without any busing) in more minority students attending their schools.

As a doctrinal matter, even if a majority of the Board members had favored desegregative measures, which plainly some did prior to their replacement by appointees of Martinelli, the Board may not escape liability for

perpetuating its segregated school system on the ground that its rejection of desegregative courses of action merely responded to the will of that segment of the populace that desired segregation. *E.g.*, *City of Birmingham*, 538 F. Supp. at 826, 828 (obstruction of low-income housing project for white area because of race-based opposition of community violated Equal Protection Clause though six of seven members of the decision-making body favored the project). As we have discussed in Part *B*.II.B. above, public officials may not, directly or indirectly, give effect to the racial prejudices of their constituents.

In sum, there was ample evidence to support the district court's findings that the Yonkers school system was segregated, that affirmative segregative acts and system-wide racially discriminatory practices of the Board substantially contributed to that segregation, that the Board adhered to the neighborhood-school policy with the intent of preserving school segregation, and that the desire to perpetuate school segregation was a motivating factor in the Board's refusals to take any step that would have had a desegregative effect. Thus, the court correctly concluded that, even though a school board that had had no part in creating or enhancing school segregation might not be constitutionally required to take affirmative steps to desegregate that system, this Board through its discriminatory and segregative actions had brought upon itself an obligation under the Equal Protection Clause to take action to decrease the segregation in the Yonkers public schools.

Though we agree with the Board that it would have been permitted to fulfill its constitutional obligations without resort to busing, we reject its notions that no action whatever was required and that it must be exoner-

ated because it preferred methods other than busing. The Board's effort to minimize the segregative-intent implication of its rejection of busing proposals by referring to the district court's observation that "[v]irtually every Board member also expressed preferences for other, voluntary methods of desegregation, most notably, the use of magnet schools and open enrollment plans," 624 F. Supp. at 1492, and by arguing that "[a] solution that tries to enlist the better nature of a community in a constructive manner is not a surrender to community prejudice" (Board brief on appeal at 79 (quoting *Hart v. Community School Board of Education*, 512 F.2d at 53)), lands far from the mark. There is no dispute that the Board members "expressed" such preferences; the flaw in the Board's argument is that the district court permissibly found the expressions to be pretextual. The quote from *Hart* is entirely inapposite, for the Board had not in fact "trie[d]" any solution. It was not the Board's failure to adopt busing that violated the minority students' rights; rather the evil lay in the combination of the Board's promotion and enhancement, through deliberately discriminatory acts and practices, of a segregated school system and its purposely discriminatory refusal to take any significant desegregative action whatever.

C. *The Sufficiency of the Causal Connection Between City Actions and Segregation in the Schools*

The City's argument that its housing decisions had no effect on the racial balance of the Yonkers schools is based principally on the opinion testimony of its expert witness to the effect that if no subsidized low-income housing projects had been built and the sites had remained vacant, the racial imbalance in the Yonkers

schools would have been substantially as it in fact was in 1980. This proposition, which is tantamount to an argument that plaintiffs failed to prove that the City's actions had any segregative effect on the schools, in untenable. The district court chose to reject the views of the City's expert and to credit instead the testimony of plaintiffs' expert, who described the way in which concentrating minority housing in an area helps to create schools that are identifiable as minority schools, and who gave his opinion that the City's decisions to build low-income housing in Southwest Yonkers and not in East Yonkers had contributed to the segregated state of the schools. We are hardly entitled to upset the district court's decision to find the testimony of one expert more credible than that of another, and certainly we may not do so where, as here, extrinsic evidence supported the view found more credible by the district court.

In 1967, the schools were already to a degree segregated, but significantly less so than they were by 1980. In 1967, only three of the City's 29 elementary schools, all in Southwest, had student populations that were predominantly minority; by 1980 there were eight predominantly minority schools, seven of them in Southwest. In 1967, 44% of the system's minority elementary school students attended the three predominantly minority schools; in 1980, 76% of the minority students attended predominantly minority schools. In 1967, there was no school whose minority enrollment was as high as 80%; by 1980, five schools—four of them in Southwest—had minority enrollments of more than 80%. At the middle school level, there was no predominantly minority school in 1967, but three out of six were predominantly minority in 1980, all of them in Southwest.

The increasing concentration of minority students in Southwest schools that theretofore had had a more balanced racial mix occurred during a period in which the City was building minority housing in Southwest Yonkers and not elsewhere, causing Southwest Yonkers to experience so-called "white flight." For example, as discussed in Part *B*.II.A.1., in the period 1960 to 1970, the number of white residents declined by 12% (from 75,952 to 66,523) in Southwest Yonkers and increased by 13% (from 106,630 to 120,494) in East and Northwest Yonkers. From 1970 to 1980, the number of white residents in both segments of Yonkers declined, but in Southwest Yonkers the decline was far more precipitous, from 66,523 to 41,124, or 38%, as compared to the decline in East and Northwest Yonkers from 120,494 to 112,785, or 6%.

Given the confluence from 1960 to 1980 of the City's confinement of low-income housing to Southwest Yonkers, the prevailing perception that low-income housing would be occupied by minorities, the net decrease by some 35,000 of white residents in Southwest while there was a net increase of some 6,000 white residents in other parts of Yonkers, the faster decline of white student enrollment in Southwest Yonkers than in other parts of Yonkers, and the nearly quadruple increase in the number of identifiably minority schools in Southwest Yonkers, the court was plainly entitled to find that the City's segregative housing decisions were a contributing cause of the increasing segregation in the schools.

D. *Sufficiency of the Evidence of City's Intent to Segregate Schools*

There is no basis in the record for overturning the finding that the City intended to preserve or enhance

segregation in the schools. Several types of evidence support this finding.

First, the City was well aware of the relationship between segregated neighborhoods and segregated schools. White residents opposing the construction of minority housing in their predominantly white neighborhoods mentioned the schools as one of their concerns. Nearly all of the councilmen from East Yonkers stated explicitly that their constituents opposed minority housing in their neighborhoods in part because they sought to keep minority children out of their schools.

In addition, there was evidence that on several occasions, City officials sought to have white areas moved into school attendance zones that had a greater predominance of white students. The effect, had the Board not rejected these requests, would have been to increase the degree of school segregation. The City has offered no other explanation for the requests, and the district court was free to infer from these attempts that the City desired that white students attend schools that were as predominantly white as it could arrange.

Further, illustrating the fact that segregated housing and segregated schools feed on and enhance one another in symbiotic fashion, Martinelli stated in his 1979 valedictory speech that his "[d]iscussion of neighborhood stability would not be complete without attention to our public school system," and emphasized that keeping children in schools within their own neighborhoods was "of critical importance" to preserving the stability of the neighborhoods. The mayor's forthright packing of the Board with persons he believed would adhere to the neighborhood-school policy provided clear support for the finding that

the City deliberately sought to preserve segregation in the schools, both for the sake of the schools and for the sake of the neighborhoods.

E. *The Interrelationship Between the Board and the City*

Finally, we reject the contentions of both the Board and the City that the district court erred in taking into account the actions and inactions of both defendants in assessing the responsibility of each. When two actors have cooperated in a given venture, each contributing to the outcome that each desires, it requires no stretch of legal doctrine to conclude that each actor is liable if the result deliberately attained is unlawful. Indeed, "it would be an inadequate analysis if a trial court contented itself with a superficial examination of isolated acts, without any consideration of possible underlying relationships that are probative of intent." *Parent Ass'n of Andrew Jackson High School v. Ambach*, 598 F.2d 705, 713 (2d Cir. 1979) (dictum).

Insofar as the Board's liability is concerned, the foreseeably spiraling effect of housing segregation and school segregation where a neighborhood-school policy is followed has been discussed in Parts *B*.III.B. and *B*.III.C. above. The district court did not err in finding that the Board's adherence to its neighborhood-school policy in light of the symbiosis bespoke a segregative intent on the part of the Board. Nor did the district court impose liability on the Board for segregation in housing or find the Board liable for school segregation solely because the City was liable for intentionally preserving segregation in housing. Rather the court found many indicia of segregative intent on the part of the Board independent of any goal or view attributable to the City, and found the City's

intent relevant, in major part, to an assessment of the Board's motivation in repeatedly refusing to take any desegregative steps. Finally, the Board cannot escape liability simply because prior to the Martinelli regime its failure to take desegregative steps was perhaps due to the racial animus of persons other than Board members. To the extent that the Board was being responsive to the wishes of segments of the community and the Council, the imposition of liability on the Board was proper since the opposition to desegregative steps was racially motivated. *See* authorities cited in Part *B*.II.B. above.

As to the City, we have discussed in Parts *B*.II.A.1 and *B*.III.C. above the segregative effect of its housing decisions and the other evidence from which the district court permissibly inferred its intent to preserve and enhance segregation in the schools. As the Seventh Circuit has stated,

> [u]ndoubtedly there are many contributing causes for racial segregation. But however complex the problem, it is clear that if residential segregation results from current or past segregative housing practices, there is a causal relation between those practices and the segregated schools. Therefore, if [a city] has participated in or contributed to these segregative housing practices either directly (*e.g.*, selective location of public housing) or indirectly . . . , it can be said that the [city] has caused, at least in part, the segregation in schools.

United States v. Board of School Commissioners, 573 F.2d 400, 408-09 (7th Cir. 1978) (footnote omitted); *accord Milliken v. Bradley*, 418 U.S. 717, 755 (1974) (Stewart, *J.*, concurring). Certainly in the circumstances

of this case, in which the City sought unabashedly to have the Board do its bidding by preserving neighborhood schools in part in order to preserve the segregated residential patterns, the City is properly held liable for segregation in the schools.

Finally, we reject the City's contention that it was improper for the district court to take into account the mayor's appointments to the Board of only persons who could be counted on to maintain segregation in the schools. While the discretionary nature of the mayor's power of appointment might defeat a suit requesting an injunction for or against particular appointments, *see, e.g., Mayor of Philadelphia v. Educational Equality League*, 415 U.S. 605, 615 (1974), nothing forbids judicial recognition of the pattern in which municipal discretion is exercised in order to fathom the municipality's underlying intent. The ineluctable conclusion that Martinelli's appointments were made with segregative intent supports the district court's conclusion that the segregated state of the Yonkers public schools—resulting from the City's confinement of minority housing to already-minority neighborhoods and from the Board's adherence to a neighborhood-school policy, its discriminatory faculty assignment and special program policies, and its failure to take any steps to achieve school desegregation—was not simply coincidental.

In sum, we agree with the district court that "the combination of the City's housing policies, the mayoral appointment of Board members and the subsequent inaction of the Board amounted to an interrelated governmental effort to preserve the integrity of 'neighborhood schools' whose racial segregation was governmentally sanctioned and steadfastly maintained." 624 F. Supp. at

1534. Where, between the municipality that has acted to preserve segregated residential patterns and the school board that has acted to preserve segregation in the schools, there is cooperation on a further course of action or inaction designed to maintain and enhance that school segregation, both the municipality and the school board may be held liable for school segregation. Given the facts discussed in the preceding sections, we conclude that there was ample evidence here to support the district court's findings of both cooperation and design.

C. REMEDIES

Each of the defendants challenges various aspects of the district court's remedial orders. In assessing these challenges we are guided by several general principles.

The power of the federal courts to remedy constitutional violations is flexible but not unlimited. In general the power to restructure the operation of state and local entities should be exercised only where there has been a constitutional violation. Where such a violation has been found, the court should tailor the remedy to fit the nature and extent of the violation. *See Dayton Board of Education v. Brinkman*, 433 U.S. at 419-20; *Milliken v. Bradley*, 418 U.S. at 738; *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16.

Nonetheless, the Supreme Court has not required that the "least restrictive means of implementation" be adopted but has

> ". . . recognized that the choice of remedies to redress racial discrimination is 'a balancing process

> left, within appropriate constitutional or statutory limits, to the sound discretion of the trial court.' "

United States v. Paradise, 107 S. Ct. 1053, 1073 (1987) (quoting *Fullilove v. Klutznick*, 448 U.S. 448, 508 (1980) (Powell, *J.* concurring) (quoting *Franks v. Bowman Transportation Co.*, 424 U.S. 747, 794 (1976) (Powell, *J.*, concurring in part and dissenting in part))). The district court, which has "first-hand experience with the parties and is best qualified to deal with the 'flinty, intractable realities of day-to-day implementation of constitutional commands,' " must be given a great deal of flexibility and discretion in choosing the remedy best suited to curing the violation, *United States v. Paradise*, 107 S. Ct. at 1074 (quoting *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 6).

> In determining whether [an] order was "narrowly tailored," we must acknowledge the respect owed a District Judge's judgment that specified relief is essential to cure a violation of the Fourteenth Amendment. A district court has "not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future." *Louisiana v. United States*, 380 U.S. 145, 154 (1965).
>
> "Once a right and a violation have been shown, the scope of a district court's equitable powers to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies." *Swann v. Charlotte-Mecklenburg Bd. of Education*, 402 U.S. 1, 15 (1971).

United States v. Paradise, 107 S. Ct. at 1073.

With these principles in mind, we conclude that the orders fashioned by the district court to remedy the housing and school segregation in Yonkers were well within the proper bounds of discretion.

I. HOUSING REMEDIES

Insofar as the court ordered the City to construct 200 units of family housing outside of Southwest Yonkers on sites selected by the City or, in default of an actual selection, on sites designated by the court, the City argues that the court abused its discretion in ordering any construction, in requiring that the housing be for low-income families, and in controlling the sites for construction. The City also challenges the order that it develop a plan to create additional subsidized and private low-income housing and that it allocate 25% of its Development Grant funds for subsidized housing. In addition, the Board challenges one aspect of the housing order. One of the sites the court has deemed the City to have selected is the closed Walt Whitman School, and the Board contends that it should not be required to yield this property since it has not been found liable for segregation in housing. In light of the substantial latitude given a district court to fashion remedies for constitutional violations, we reject each of the parties' challenges.

As discussed in Part *B*.II.A. above, once a municipality has undertaken to construct low-income housing, it may not, consistent with the Equal Protection Clause, deliberately and with segregative intent concentrate that housing in predominantly minority neighborhoods. The remedy fashioned by the district court is closely tailored to the City's constitutional violations and intrudes no more than necessary on the City's prerogatives, consistent with en-

suring that some remedial action will in fact occur. Thus, the court built upon a consent decree, already agreed to by the City with HUD, for the construction of 200 units of family housing using federal funds; it was plainly reasonable for the district court to believe that the order requiring the City to comply with this undertaking was necessary in light of the City's prior disregard of governmental urging that it select housing sites outside of Southwest and its historical willingness to forgo federal funding in order to preserve segregated housing patterns. The number of units, 200, was hardly excessive in light of the City's agreement with HUD and the existing concentration of 6,566 units of housing, or 96.6% of all of its subsidized housing, in Southwest. The requirement that the housing be built outside of Southwest Yonkers obviously was necessary in order to achieve some degree of correction of the imbalance caused by the City's unlawful concentration of all prior low-income family housing inside Southwest Yonkers. In addition, it was appropriate and prudent for the court to give the City a deadline for designating the construction sites outside of Southwest and to deem the City to have chosen sites selected by the court if the City failed to meet that deadline. The City's past history of foot-dragging (*e.g.*, nine years taken to approve sites for 750 units) and its refusals to approve any site for low-income housing outside of Southwest or Runyon Heights plainly warranted the imposition of a deadline and the inclusion of default provisions.

We are also unpersuaded that the court abused its discretion in ordering the Board to return to the City the site of the closed Walt Whitman School. The Board made no showing that it had any plans to reopen Whitman, and after the site was identified as one that could be used for

low-income housing, took the position that it might use that building to train teachers or store books. The court order provided that, in turning over the Whitman site to the City, the Board was entitled to reserve space for these training and storage purposes. The Board has made no other objections that we find persuasive. The circumstances of this suit made it appropriate for the court to look to closed school properties as possible housing sites, for while the Board was not held liable for housing segregation, the court found that there was "an interrelated governmental effort" by the City and the Board to preserve segregated neighborhood schools and that the City advocated such schools partly in order to maintain segregated neighborhoods; the City's housing segregation was thus exacerbated by the Board's knowing adherence to a neighborhood-school policy. Since the Board's actions helped to enhance the segregated housing patterns, and since all of the pertinent persons are parties to the present suit, it was permissible for the court to order the Board to return the closed school to the City.

We have considered all of the defendants' other arguments against the district court's housing order and have found them to be without merit.

II. SCHOOL REMEDIES

Each defendant makes one major challenge to the court's remedy for school segregation. The Board contends principally that the court should not have ordered it to implement a system-wide redistribution of students in light of the nature of the constitutional violations found by the court. The City argues that it should not have been ordered to fund a plan that is more expensive than a simple mandatory busing plan would be. We see no abuse

of discretion in the district court's ordering the desegregation of all of Yonkers's public schools or requiring the City to fund the ordered plan.

Although the Board argues against a system-wide remedy on the premise that certain of its segregative actions, such as the zone realignments between Schools 16 and 25, affected only discrete geographic areas and that its system-wide discriminatory practice of assigning minority staff members disproportionately to predominantly minority schools did not have a direct effect on the distribution of students, it is quite plain that many of the Board's actions or practices did have comprehensive segregative effects that the court could properly seek to eliminate. For example, the Board's disproportionate assignment of minority teachers to schools having a disproportionately high number of minority students and its refusal to invoke its contractual right to stem the flow of more experienced white teachers to the more attractive schools outside of Southwest not only skewed the distribution of teachers but also contributed to the identification of some schools as minority schools and others as white schools and contributed to the inferior quality of education available at the Southwest Yonkers schools. Similarly, the discriminatory placement of minorities in special education classes and the "inhumane" treatment of special education classes were shown to have far-reaching effect. The Board's pattern of placing the heavily minority special classes in virtually all-white schools served to stigmatize all minorities, giving many regular students at predominantly white schools the idea that minorities in general were "less worthy," and making it more difficult for regular minority students to gain peer acceptance at predominantly white schools.

Further, even Board actions whose immediate segregative effect may have been visited upon just one school often had secondary effects elsewhere. For example, with respect to the Board's refusal to close Longfellow, the district court was not required to focus narrowly on the segregated status of that school alone. The disproportionately high number of minority students at that school was exacerbated when Longfellow was rezoned to send some of its white students to the newly opened Burroughs; when Burroughs was closed, students from Burroughs were not reassigned to the nearby Longfellow with desegregative effect, but were allowed to attend schools in far corners of the City, with further segregative effect.

Finally, the Board's general cooperation with the City's effort to maintain segregated neighborhoods, the effect of which was to enhance segregation in the schools, in itself provided added justification for the court to order a system-wide remedy. *Cf. Milliken v. Bradley*, 418 U.S. at 755 (Stewart, *J.*, concurring) ("Were it to be shown, for example, that state officials had contributed to the separation of the races . . . by purposeful, racially discriminatory use of state housing or zoning laws, then a decree calling for transfer of pupils across district lines . . . might well be appropriate.").

In sum, the district court found that there had been system-wide constitutional violations and its detailed findings support its conclusion that a system-wide remedy was needed.

We also reject the Board's contention that it will be impossible to attain the remedial order's goal of desegregation of all schools, *i.e.*, bringing each to within 10-15% (for magnet schools) or 20% (for nonmagnet schools) of

the system-wide proportion of minority students. We see nothing inherently impossible in the goal, and we note, in any event, that it is a goal rather than an immutable directive. The order states that the Board "shall seek to achieve" this desegregation of the system.

Nor do we find merit in the City's complaint that it is improperly being required to pay for a desegregation plan that is more expensive than a simple mandatory busing plan would be. Although there is no question that the court-ordered plan is more expensive, that simple fact provides no basis for altering the relief ordered. The cost of a mandatory busing plan does not provide a benchmark that is relevant here, since that is not a remedy the City at all prefers. As late as the eve of implementation of the plan ordered by the court, the court asked the City's attorney whether the Council had in fact made any determination that it preferred a more mandatory but less expensive plan. The answer was short and plain: "No, it has not." In view of community opposition to busing proposals over the years, it is hardly surprising that the City does not support a mandatory busing program, even to save money. Throughout the period covered by this lawsuit, the City repeatedly eschewed desegregative courses of action, both in housing and education, in favor of segregative alternatives that were far more expensive. In all the circumstances, we see no abuse of discretion in the district court's rejection of the City's attempt to provide less funding than is needed to implement the adopted plan, simply because of the lower projected cost of a plan the City is not willing to endorse.

In selecting the desegregation plan ordered here, the district court plainly made appropriate efforts to eliminate any expense that was not necessary to remedy the

violations found and to minimize the degree to which the remedy would interfere with the autonomy of the City and the Board. The voluntary magnet-school plan was adopted only after all of the parties had been given an opportunity to submit proposals; the approach chosen was essentially that proposed by the Board. The court required the Board to submit a separate itemized budget for the desegregation expenses; it made appropriate findings that the proposed budget represented the reasonable and necessary estimated cost of implementing the plan; and it has taken appropriate care to ensure that the Board's projected expenditures for the ordered plan, insofar as they exceed the normal budgetary appropriations, are in furtherance of the desegregation remedy rather than of the general enrichment of the school program. It appointed a monitor to oversee compliance and it has retained jurisdiction to ensure that the parties carry out their respective responsibilities. The City, though given an extra opportunity to do so, did not show that any part of the adopted plan was duplicative or unnecessary to the plan's success.

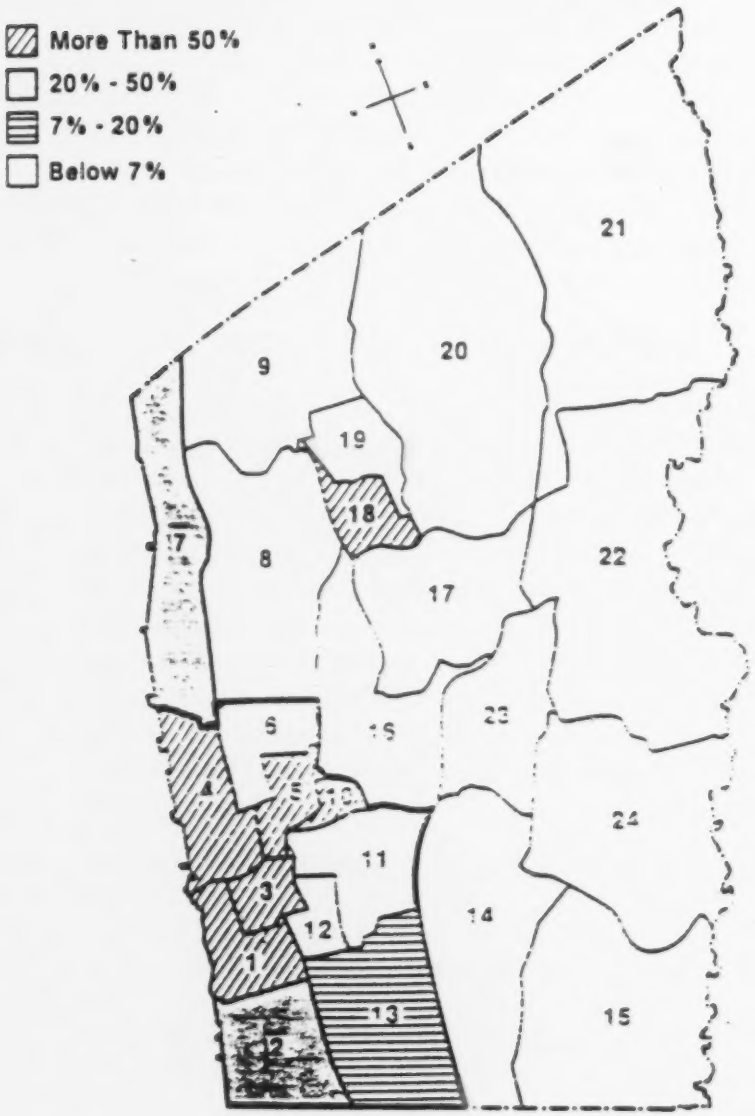
Finally, because of the voluntary aspect of the school plan ordered by the district court, that remedy, while more costly than another plan might be in terms of dollars, is both less intrusive and more likely to achieve long-term success in desegregating the public schools. Since the City is responsible for funding the public schools and is responsible in part for the segregated condition of the schools, it was not an abuse of the court's discretion to require the City to fund the more expensive, but practically more effective, remedy.

CONCLUSION

The judgment of the district court is in all respects affirmed.

APPENDIX A

CITY OF YONKERS CENSUS TRACTS WITH LARGE MINORITY POPULATIONS (1980)

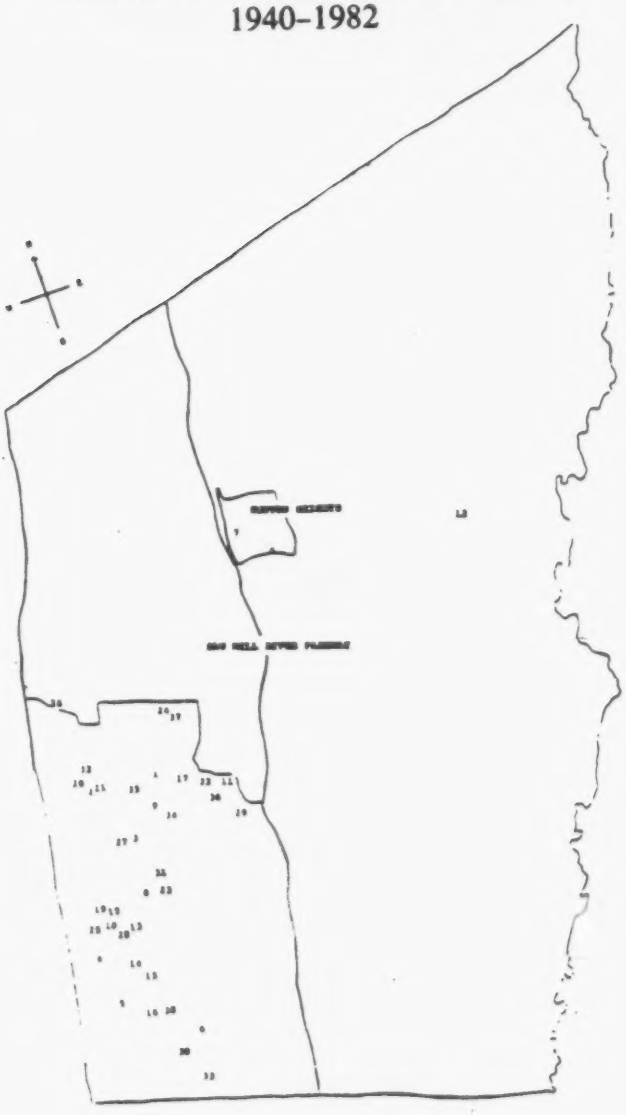


The Heavily Outlined Section is the Southwest.

Second Circuit Court of Appeals Opinion

APPENDIX B

CITY OF YONKERS
SUBSIDIZED HOUSING SITES
1940–1982



CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Fourteenth Amendment, Section 1:

> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil action for deprivation of rights:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The Civil Rights Act of 1964, Title IV, 42 U.S.C. § 2000c, *et seq.*:

§2000c - 6. Civil actions by Attorney General

(a) Whenever the Attorney General receives a complaint in writing —

(1) signed by a parent or group of parents to the effect that his or their minor children, as members of a class of persons similarly situated, are being deprived by a school board of the equal protection of the laws, or

(2) signed by an individual, or his parent, to the effect that he has been denied admission to or not permitted to continue in attendance at a public college by reason of race, color, religion, sex or national origin,

and the Attorney General believes the complaint is meritorious and certifies that the signer or signers of such complaint are unable, in his judgment, to initiate and maintain appropriate legal proceedings for relief and that the institution of an action will materially further the orderly achievement of desegregation in public education, the Attorney General is authorized, after giving notice of such complaint to the appropriate school board or college authority and after certifying that he is satisfied that such board or authority has had a reasonable time to adjust the conditions alleged in such complaint, to institute for or in the name of the United States a civil action in any appropriate district court of the United States against such parties and for such relief as may be appropriate, and such court shall have and shall exercise jurisdiction of proceedings instituted pursuant to this section, provided that nothing herein shall empower any official or court of the United States to issue any order seeking to achieve a racial balance in any school by requiring the transportation of pupils or students from one school to another or one school district to another in order to achieve such racial balance, or otherwise enlarge the existing power of the court to insure compliance with constitutional standards. The Attorney General may implead as defendants such additional parties as are or become necessary to the grant of effective relief hereunder.

(b) The Attorney General may deem a person or persons unable to initiate and maintain appropriate legal proceedings within the meaning of subsection (a) of this section when such person or persons are unable, either directly or through other interested persons or organizations, to bear the expense of the litigation or to obtain effective legal representation; or whenever he is satisfied that the institution of such litigation would jeopardize the personal safety, employment, or economic standing of such person or persons, their families, or their property.

(c) The term "parent" as used in this section includes any person standing in loco parentis. A "complaint" as used in this section is a writing or document within the meaning of section 1001, Title 18.

The Civil Rights Act of 1964; Title VI, 42 U.S.C. § 2000d, *et seq.*:

§ 2000d. Prohibition against exclusion from participation in, denial of benefits of, and discrimination under Federally assisted programs on ground of race, color, or national origin

No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

Supreme Court, U.S.
FILED
APR 22 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1632

In The
Supreme Court of the State of the United States
October Term, 1987

YONKERS BOARD OF EDUCATION,

Petitioner,

v.

UNITED STATES OF AMERICA AND YONKERS BRANCH—NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,

Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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In The
Supreme Court of the State of the United States
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YONKERS BOARD OF EDUCATION,
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OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

STATEMENT OF THE CASE

Both the district court and the Court of Appeals found that the Yonkers Board of Education (hereafter "YBE") engaged in a range of discriminary *and* segregative practices and was substantially influenced by racist community sentiment in making a number of critical educational decisions. We review these bases for liability below to demonstrate that the Petitioner has substantially misstated the basis for the liability findings reached below.[1] In fact, neither court held the YBE liable based

1. Thus, petitioner insists that "[T]he decision below . . . stands for the proposition that where racial imbalance in public schools is caused, in significant part, by discriminatory housing practices, school authorities may be held liable for systemwide segregation for failing to take action to rectify the results of such practices." Petition for Writ at 7. As we show below, the decision neither stands for that proposition nor any other which is at variance with settled constitutional principles.

upon the independent segregative acts of City officials. Rather, school authorities were held liable for a plethora of discriminatory and segregative decisions which *they* authored.

Municipal officials who, the evidence compellingly showed, adopted and maintained segregative housing policies in part to insure segregated schools, were held liable for the extant school segregation. But, it is critical to keep in mind that the school desegregation remedy adopted here was meant to cure the constitutional violations committed by the YBE.

I. The Existence of Segregated Schools Cannot Seriously Be Contested

At the time the Complaints in this case were filed, "the great majority of schools [in Yonkers] were either disproportionately white or disproportionately minority" (609a). About 85% of Yonkers minority elementary school students attended nine schools in Southwest Yonkers, the area of minority concentration. More than 55% of Yonkers' minority elementary school students attended "just five Southwest Yonkers schools, whose minority populations were 75%, 81%, 90%, 98% and 98%." *Id.* Of the sixteen elementary schools located outside of Southwest Yonkers, 14 had students populations that were at least 90% white. Of the eleven elementary schools in East Yonkers, only one had a minority student population of more than 7% (610a). Likewise, the middle schools and high schools displayed substantial racial segregation.

II. School Board Liability

A. Manipulation of Zones and Openings and Closings of Schools

The district court carefully assessed many boundary line changes, finding a number which were explicable only by reference to segregative intent. For example, on three occasions, the YBE changed the boundaries between two opposite race schools, Schools 16 (white) and 25 (increasingly minority) in a manner which contributed to the racial identifiability of these schools (622a-623a). The Court of Appeals agreed with the district court—the YBE had offered no factually warranted non-racial justification for these manipulations. *Id.*

Likewise, a 1963 attendance zone change between Schools 9 and 12 "was similarly unexplained by race-neutral criteria." Through this change, 40% of School 9's minority students were reassigned to School 12, a school which, before the reassignment, had a higher representation (40%) of minority children than did School 9 (15%). As the Second Circuit noted, "This boundary change was contraindicated by the relative student capacities of the two schools. According to the Board's figures, prior to the change, only 77% of the capacity of School 9 was utilized; School 12 was 96% full. The boundary change caused School 12 to be overcrowded." (624a)

The Court of Appeals also affirmed the district court's finding that the YBE's treatment of an identifiably black junior high school, Longfellow, demonstrated clearly segregative intent, with impacts on a number of other junior high facilities. In 1969, in opening another junior high school, Burroughs, the YBE re-zoned hundreds of white students from Longfellow, increasing its minority percentage to 50%. The school was severely underutilized; had no recreational facilities and had a disproportionately high proportion of minority teachers. In 1977,

when Burroughs was converted to a vocational high school, the Longfellow PTA "urged the Board to *return to Longfellow* the predominantly white area that had been rezoned from Longfellow to Burroughs in 1969" (emphasis added). As the Court of Appeals reiterated, "such a reallignment would have made use of Longfellow's excess capacity and had a desegregative effect" (625a). The YBE rejected this suggestion, reassigning these white students to two overwhelmingly white junior high schools—Emerson and Whitman—both of which were further from the homes of the affected white students than was Longfellow. *Id.*

While the YBE argued that an intention to close Longfellow motivated these reassignments, in fact, any plan to re-assign Longfellow's overwhelmingly black student body was squelched by the racially-based opposition of parents from potential receiving schools, like Twain. The Court of Appeals reaffirmed the district court's rejection of the reasons asserted for the YBE's ultimate decision to maintain Longfellow and not to re-assign its students to Twain, finding them pretextual (625a-626a).

The district court and the Court of Appeals both found the YBE to have been motivated by segregative intent in the opening of Commerce Middle School in 1973. As the Court of Appeals' decision relates, this school opened majority minority. Before its opening, the YBE considered and rejected "a number of proposals that would have avoided the creation of yet another predominantly minority school in Southwest Yonkers." As with parental opposition to movement *of* minority students into Twain, white parents from Emerson (8% minority) *opposed* any relocation "of white students to form an integrated Commerce Middle, opposition the Board perceived as grounded principally in racial concerns."

Capitulating to this pressure despite knowledge that its decision would lead to a racially-identifiable Commerce Middle School, the YBE re-assigned *no* Emerson students to the new middle school and assigned only former Gorton Junior High students to the new program. And, in succeeding years, the YBE altered Commerce Middle's boundaries to include increasing numbers of minority students (628a).

In so proceeding, the YBE rejected other integrative alternatives, such as assigning more minority students from the former Gorton Junior High zone to Emerson. To the contrary, rather than increasing the minority enrollment at Emerson, in 1973, the YBE reassigned one-third of its small minority population *out of* that school "in response to race related concerns of the Emerson community regarding the presence of minority students at the school." (628a)

The district court acknowledged that other actions by the YBE were clearly segregative: the 1976 school closings exacerbated segregation in many southwest Yonkers elementary schools. However, rather than attributing segregative design to these actions, taken alone, the district court chose to analyze them in context: the YBE had promised in 1976 to cure the known segregative impact of these closings. The district court focused on whether the YBE did so and, if not, why not. This, in turn, was part of a broader inquiry into how the YBE treated proposals to reorganize its schools and whether these decisional processes were substantially influenced by illicit racial concerns.

B. Response to Reorganization Proposals

Starting in 1968, the YBE clearly recognized that racial segregation in Yonkers "prevented equality in educational opportunity" (631a). In 1971, Superintendent Alioto observed the increasing racial imbalance in the school system, noting that minority students were concen-

trated in decrepit buildings with minimal recreational facilities. Moreover, these students were taught by teachers with much less experience than those assigned to East Yonkers' white schools. The Superintendent and his staff concluded that addressing educational inequality demanded changes: majority schools were often substantially under-used while minority-area schools were congested and over-crowded. But, when he proposed measures which would equalize educational opportunities while at the same time yield more integration, Alioto met fierce community opposition (632a). As the Court of Appeals affirmed, "Alioto believed it would be politically infeasible to proceed with desegregative efforts in the schools." *Id.* And, this recognition had a practical effect: it caused the school system to reject educationally-driven proposals which had integrative consequences.

i. The 1973 Reorganization

The Court of Appeals properly affirmed extensive district court findings that racially-based community opposition defeated educational proposals to improve the efficiency of district operations (grade re-organization) and make more equitable and available the vocational education programs. Instead, the YBE adopted "the most segregative proposals that had been made either in the NYU report [which triggered this re-organization] or in the ensuing alternative suggestions" (634a). As a consequence, an educationally-based plan which would have decentralized the highly segregated vocational program, then housed at Saunders, and offered—in an integrative manner—two complete sets of the existing vocational courses in the academic high schools was withdrawn. And implementation of a uniform grade re-organization proposal, also broached for independent educational reasons, was likewise repudiated because of the desegregative effects which would have derived from its implementation.

ii. Phase II

In August 1977, following the segregative 1976 school closings (known as Phase I) and the receipt by the YBE of recommendations of the Task Force for Quality Education, the new school superintendent, Dr. Joseph P. Robitaille, proposed Phase II which "recognized the interrelationship among the [school] system's fiscal, enrollment, utilization and racial problems" (636a). "The principal changes proposed . . . were (1) reorganization of the below-high school grade configuration to K-6 and 7-8; (2) the closing of three middle schools, Longfellow, Fermi and Burroughs; (3) the relocation of Saunders to the to-be vacated Burroughs facility; (4) the closing of Southwest Yonkers' School 6, then 98% minority, and the reassignment of its students to underutilized elementary schools to the north, with a view to improving racial balance and (5) the adoption of "Yonkers plan" for school desegregation." *Id.*

The latter proposal was meant to insure better utilization of facilities, producing efficiencies in operation which, it was uncontravertedly estimated, would result in savings of about $30 million over the succeeding ten years (637a).

The district court made extensive findings concerning the influence of illicit, racially discriminatory motives in the YBE's rejection of the bulk of Phase II (411a-413a). The district court also examined what actions the YBE took after its rejection of Phase II to address the problems which prompted that proposal (418a). Noting that Phase II had contemplated closing two overwhelmingly minority schools, Longfellow and School 6, the district court found "persistent inaction" "even though both schools were significantly underutilized, regarded as educationally inferior and physically inadequate" (419a). This, the district court found, was explicable based only on "its [the YBE's] awareness of community opposition to the desegregative reassignment of Southwest Yonkers students which the

Phase II proposals would have likely entailed." (420a)

The district court found "[T]he Board's failure to implement all or part of Phase II's desegregative proposals, or any alternatives to these proposals" "in many respects consistent with the Board's failure to implement desegregative reorganization proposals and the district's recognition of the community resistance to school desegregation. Beginning in 1970, the record discloses an awareness by school officials of the community's opposition to desegregation and a concomitant failure by school officials to adopt and implement *educationally and fiscally sound proposals which would have helped rectify the recognized racial imbalance in the district" (425a) (emphasis added).*

In short, the YBE deliberately perpetuated racial segregation. *Id.* ". . . the record makes clear that the initial reluctance to implement desegregative school reorganization plans evolved into a persistent failure to adopt measures to correct recognized educational and racial imbalances in the district in part because of their desegregative consequences" (426a). And, with this failure, the educational inequality and fiscal waste which had themselves prompted desegregative proposals grew more acute. The district court found,

> "As a result of the Board's refusal to adopt any of the desegregative proposals of Phase II, the school district's acknowledged facility under-utilization, educational inequality and racial imbalance continued." (430a)

Specifically, East Side (white) schools were substantially under-utilized (some used below 50% of student capacity), *Id.*, while over-utilization and crowding characterized west side elementary schools. On the middle school level, whites were crammed into overwhelmingly white Emerson and Twain, while 98% minority Longfellow and Fermi operated way below utilization. *Id.*

C. Systemwide Segregative Practices

i. Faculty Assignments: The district court found that the YBE assigned a disproportionate number of minority staff to disproportionately minority schools in southwest Yonkers and that this served "as a clear indication that racial segregation was acceptable even where residential segregation and transportation concerns did not impede the implementation of race-neutral assignment policies" (487a). This practice had an "appreciable impact on the schools" and "was exacerbated by the relative inexperience of the minority staff members and by the assignment of minority Special Education teachers to predominantly white schools." *Id.* The Court of Appeals affirmed these conclusions and rejected, as had the district court, the YBE's attempt to pass the blame for the staff assignments off upon its collective bargaining agreement with the Yonkers Federation of Teachers (650a). First, such practices predated that contract and second, the contract expressly allowed the Board to make assignments necessary to avoid racial imbalance in staffing.

ii. Operation of the Vocational Education Program

The district court also found that "over the years," the YBE first had "steered minority students" into vocational education programs and then adopted knowingly segregative screening policies to exclude minority students, black and Hispanic, from the elite Saunders Vocational High School. *See* 320a-335a for detailed findings of fact. Such exclusion left minority students disproportionately affected by the educational deficiencies at Gorton and Yonkers High Schools (488a).

Not only did this steering deprive minority students of admission to Saunders, the elite vocational high school, segregating that facility. It also caused a disproportionate number of west side white students to seek and gain admission into Saunders, thus increasing the prevalence of minority students at the two west side high schools, Gor-

ton and Yonkers. Thus, the discriminatory operation of the special education program directly led to increased racial segregation at three of the district's five high schools.

iii. Special Education

The district court found that the discriminatory "operation of its Special Education program . . . served to reinforce community opposition to desegregation" (488a). In short, "minority students not only were assigned in disproportionate numbers to such classes but were also accorded treatment entirely inconsistent with the Board's general neighborhood school policy." *Id.* This was so because Yonkers assigned black and Hispanic special education pupils as the *only* minority children in a number of otherwise white schools. The white students and their parents generalized from the conduct of these children and gained stereotypic impressions of minority children. These, they then applied, in the debates concerning school district reorganization, to all minority children. *See* 338a-355a for findings of fact on discriminatory nature of YBE's special education program.

iv. Unequal Educational Opportunity

While not holding the YBE responsible for creating educational inequality, the district court found significant the facts that (a) the YBE members recognized the profound inequality of educational opportunity suffered by minority children (black and Hispanic); (b) race-neutral factors guided school authorities to propose several means of alleviating the burden of inequality but (c) "the Board's . . . conduct served to perpetuate many of these inequalities, thus depriving many minority students of an educational experience comparable to that available at other public schools in Yonkers." and (d) the YBE's conduct was itself prompted by obeisance to racially segregative community sentiment (493a).

D. The Impact of the City's Liability on the YBE

While petitioner casts the district court's liability decision as solely predicated upon its failure to rectify the impact of intentionally segregative municipal decisions concerning the location of assisted housing, this is clearly not a fair reading of either that opinion or its affirmance by the Court of Appeals (505a).

While the school district's actions were fully consistent with the municipality's segregative design and the YBE came to be dominated, through the Mayor's purposeful appointments, by opponents of integration, the district court did not base its liability holding on the Board's "responsibility" for the City of Yonkers' segregative housing choices. Moreover, this is not an instance where a school board, otherwise innocent of segregative and/or discriminatory policies and practices, is held liable because of the actions of third parties not involved in the suit.

As the district court found the YBE liable for its own actions and omissions, the opinion by the Court of Appeals rests squarely on that basis as well. The Board, though fully aware that the City of Yonkers was engaged in a highly segregative policy of confining assisted housing to the area of minority concentration, the quadrant of southwest Yonkers, adhered to a neighborhood school policy (649a). The YBE did so out of an intent to perpetuate segregation and the Court of Appeals found this confirmed by reference to the systemwide segregative practices exposed by the district court. *Id.*

Contrary to the submission made to this Court by the Petitioner, the Court of Appeals read the district court's opinion to hold "that many of the Board's actions and inactions with regard to school openings, closings and attendance zone changes evinced a segregative intent" (651a). Moreover, just as on the housing side of this case, the responsiveness of decision-makers to "race-based community resistance to desegregation" informed the Board's

"persistent rejection" of all educational proposals with desegregative effect. Indeed, in affirming the liability of the YBE, the Court of Appeals did *not* rely on any claim that this defendant was legally liable because of the segregative housing policies engaged in intentionally by Yonkers' municipal officials (697a). Rather, by selectively adhering to a neighborhood school policy when it knew that this policy would increase racial segregation, the YBE violated the constitutional rights of black and Hispanic students. This intent was inferrable from a series of segregative and discriminatory practices outlined at 689a-695a. Moreover, the Court of Appeals found "entirely frivolous" any argument that the YBE's bow to white community pressure was unrelated to racism (695a). Instead, the record evidence clearly demonstrated repeated instances where such opposition dominated the YBE's decision-making. *Id.*

III. LEGAL ARGUMENT

A. AS NEITHER THE DISTRICT COURT NOR THE COURT OF APPEALS BASED ITS LEGAL CONCLUSIONS ON THE ACTIONS AND OMISSIONS OF THIRD PARTIES, THE YBE'S FIRST BASIS FOR SEEKING REVIEW IS ILLUSORY

As shown above, neither the district court nor the Court of Appeals ruled that the YBE was liable because "it did not adopt a racial balance plan to alleviate the segregative impact of public housing discrimination and ameliorate unintended educational "disparities." Instead, both decisions below rest squarely on the findings, nowhere challenged in Petitioner's writ, that the YBE (a) engaged in specific segregative acts by manipulating attendance zones and opening and closing schools; (b) failed to adopt and implement educationally and fiscally sound

policies because the impact of these would have been desegregative and pervasive racially-based opposition by whites made such actions politically unpalatable; (c) thus perpetuated segregation and acknowledged educational inequality to the detriment of minority children and (d) intentionally carried forward other systemwide practices which had both discriminatory impact upon minorities and segregative effects.

1. The Courts Below Properly Rejected Petitioner's Assertion that it Consistently Followed a "Neighborhood School" Policy

As a matter of record, both the district court and the Court of Appeals rejected petitioner's argument that it consistently followed a neighborhood school policy. Instead, where diverting from such policies furthered segregation or discrimination, i.e., the boundary changes between School 16 and 25; the assignment of whites to Emerson and Whitman, as opposed to Longfellow; the assignment of minority special education students far from their homes to East Side elementary schools, the district did not adhere to any such policy (502a-503a).

2. The YBE Operated its Neighborhood School Policy to Forward Segregative Municipal Objectives

Beyond such niceties, the district court concluded and the Second Circuit affirmed, that here, where the Mayor appoints the School Board and where he does so expressly to insure that desegregative measures are not adopted, and where the rejection of such measures carries forward intentionally created residential segregation and educational inequality, a School Board may be held liable for segregated schools despite reliance on a neighborhood school policy.

The district court found that "the combination of the City's housing policies, the mayoral appointment of

Board members and the subsequent inaction of the Board amounted to an intergovernmental effort to preserve the integrity of "neighborhood schools" whose racial segregation was governmentality sanctioned and steadfastly maintained" (500a). As the trial court wrote, "Where a City official exercises power over school board appointments as a means of furthering the city's segregative objectives and discouraging comprehensive reform, it would be anomalous to hold simultaneously that a school board's effectuation of these objectives is irrelevant in determining its liability for resulting school segregation."

Rather than challenging these propositions head-on, the petitioner starts with the assumption, contrary to this record, that the YBE was an autonomous and independent agency. The district court found otherwise—that the Mayor consciously and intentionally stacked the Board with members dedicated to furthering the municipal objective—segregated schools and segregated neighborhoods. Whatever the educational implications of adhering to such boundaries, whether they comported with student enrollments or entirely flouted, as was the case, the capacities of school buildings, the Martinelli Board was bent, as was its author, on maintaining segregation.

We believe that in light of the actual bases for liability in this case and the substantial record evidence which predicates that legal conclusion, this Court should decline to review the first question presented for review.

3. The Opinions Below Do Not Conflict With Those Rendered By Other Circuits

Nor do any of the cases petitioner cites raise any conflict between the Court of Appeal's opinion and that of other Circuits. As the Court of Appeals found,

> ". . . the district court's findings of segregative intent on the part of the Board is supported by evidence of (1) the segregative impact of its decisions and the foreseeability of

that impact, (2) the discriminatory nature of certain of its affirmative acts, which included segregation-enhancing school zone realignments, race-based staff assignments; race-based placement of minorities in special classes and prejudice-enhancing treatment of those classes, race-based decisions on school openings and closings, and systematic exclusion of minorities from vocational programs, and (3) the Board's failure, in deliberate responsiveness to the race-based opposition of some segments of the community, to implement any step that would have been desegregative." (686a)

Petitioner has not challenged any of the findings of fact underlying these conclusions as clearly erroneous, nor could it have. In this light, its statement of the first question for review has an invalid premise which, in itself, should suffice to cause denial of that portion of the writ. In short, the bases for its liability were numerous and did not include the YBE's failure to adopt a racial balance plan to cure conditions for which it bore no responsibility.

Liability rests here on what the YBE did and why it omitted other acts. This case then is distinguishable from others cited by petitioner. In *Bell v. Board of Education, Akron Public Schools,* 683 F.2d 963 (2d Cir. 1982), the Sixth Circuit considered the relevance of evidence that public housing authorities had engaged in segregative conduct where a school board was "otherwise innocent of segregative intent" (at 968). Here, the Court of Appeals' opinion affirmed the district court's conclusion that the YBE manifested unlawful, segregative intent in many ways, apart from its failure, for racially segregative reasons, to ameliorate extant racial segregation.

In *Bronson v. Board of Education of the City School District of Cincinnati,* 578 F.Supp. 1091, 1104-05 (S.D. Ohio 1984), the district court found that plaintiff had failed to identify any specific acts of the suburban defendants from which it could infer that they had done anything with the intent of confining blacks to Cincinnati. With respect

to other unnamed entities, the district court likewise found no evidence that any acted in concert with the named parties to forward racial confinement or segregation. Of course, in *Yonkers*, the district court found and the Court of Appeals affirmed findings which are fully supported on this record: that school officials worked with other municipal officials, representing the City defendants, to insure the perpetuation of segregated schools in segregated neighborhoods. The evidentiary "nexus" absent in *Bronson, supra*, linking the conduct of school officials and those responsible for housing policy, was present and proven in Yonkers. Thus, fairly read, this case stands for no legal principles at variance with those relied upon by the courts below.

Likewise, in *Higgins v. Board of Education of Grand Rapids*, 508 F.2d 779, 788 (6th Cir. 1974), the Sixth Circuit expressly stated that "while it is certainly possible for segregated schools caused by segregated housing in turn to cause worsening of residential segregation, a stronger showing of a significant effect than that presented in this case would be required to upset the finding of the trial court." There, the trial court found that neither private market housing discrimination nor state action relating to assisted housing contributed to or "caused" school segregation. On that record, the Sixth Circuit affirmed.

But, *Higgins, supra*, surely does not stand for the proposition that, in an appropriate case, where segregative state action in the housing sphere has been linked (in an evidentiary manner) to school segregation and where a joint and unconstitutional intent links actors from both spheres, and where school actors have manifested their intent through specific segregative acts and omissions, liability for the school segregation may not be placed on school authorities. As that is precisely what we have in Yonkers, *Higgins* cannot be read as authority to the contrary.

Finally, in *Deal v. Cincinnati School Board*, 369 F.2d 355 (5th Cir. 1966) and 419 F.2d 1387 (6th Cir. 1969), that Circuit rejected plaintiff's frontal attack on the neighborhood school policy in the absence of evidence that (a) the policy was being maintained in concert with intentionally segregative housing practices; (b) the policy was carrying forward segregation caused or contributed to by school authorities and (c) specific alternatives to the application of the policy which themselves had educational and financial advantages were rejected for racial reasons. As all three of these factors obtain in *Yonkers, Deal is of limited force and certainly not in conflict.* In *Deal*, the district court expressly found no evidence of *discriminatory or segregative* practice on the part of school authorities, 419 F.2d 1392.

Just as the Sixth Circuit cases cannot be construed as conflicting with the Second Circuit's decision in *Yonkers*, the Fourth Circuit's recent decision in *Goldsboro City Board of Education v. Wayne County Board of Education*, 745 F.2d 324, (1984) is inapposite. In *Goldsboro City, supra*, at 329, plaintiffs alleged that, in the face of demographic changes which made the city school system more black, it was unconstitutional for a county school system to maintain a city/county school district division which was racially neutral when commenced. Finding no evidence that the construction of public housing in the City was intended to concentrate black children in the City school district, the Circuit found inter-district school relief inappropriate. As this case did not consider a situation like that posed in *Yonkers*, it cannot fairly be said to conflict with the Second Circuit ruling in our case.

Moreover, the lessons drawn by the petitioner—that school boards should not be held liable for housing segregation—miscasts, as shown above, the bases for liability here. For all these reasons, the first question presented does not merit this Court's review.

B. THE YBE KNOWINGLY PERPETUATED EDUCATIONAL INEQUALITY OUT OF OBEISANCE TO THE WHITE MAJORITY

In posing its second question presented, petitioner suggests that it has been found liable for simply failing to insure educational equality, an illusive goal at best. However, this seriously misconstrues the district court's opinion and its affirmance by the Second Circuit.

School authorities in Yonkers recognized their obligation to provide, to the extent possible, equal educational opportunity to minority children. Moreover, starting with Superintendent Mitchell in the late 1960's, the district fully appreciated that it was failing in this task. For one, school overcrowding and a prevelance of inexperienced teachers characterized minority schools, while spacious and underutilized schools with experienced teachers typified the overwhelmingly white schools in East Yonkers. Had the students all been of one race, the district court found, school authorities would have been permitted to adopt educationally responsible techniques to adjust these inequalities, better enacting their responsibilities under state and federal law. *But,* the students were not all of the same race and when school authorities proposed reorganizations intended to ameliorate educational disparities, with attendant financial advantages, *white opposition, itself racially motivated,* prevailed and prevented the enactment and implementation of race-neutral, educationally sound policies.

The district now argues that this Court should prohibit federal district courts from 'meddling' in such situations and that federal courts cannot choose between alternative strategies for maximizing academic excellence. But these arguments are really smokescreens. This Court has long since held that when courts find that racial discrimination is influencing governmental policy, they may not turn their backs and regard such discrimination as

just another competing factor in public discourse and debate. *Village of Arlington Heights v. Metropolitan Housing Dev't. Corp.*, 429 U.S. 252, 265 (1977). Indeed, "where there is proof that discriminatory purpose has been a motivating factor in the [governmental] decision . . . judicial deference is no longer justified.' *Id.*

Here, the YBE's perpetuation of educational inequality was itself the result of white community opposition which limited educational options. Any option with integrative effects was resisted and, in this arena, the YBE generally capitulated to public pressure and failed to implement policies which had other race-neutral, educational and financial wellsprings.

The issue then is not whether "some disparities" remained in the educations offered to minority children. This is frankly beyond any rational dispute. Rather, the question is whether the district court erred in finding that the YBE capitulated to racially-motivated community pressure when it failed to implement Phase II or some alternative or when it removed all the integrative aspects of the NYU report.

As the petitioner does not challenge the underlying factual findings, its legal argument is without merit. For surely, if, as the district court found and the Court of Appeals affirmed, the YBE diverged from pursuing educationally and fiscally sound policies due to racial opposition, it violated the constitutional rights of minority children.

C. BLACKS AND HISPANICS WERE THE TWO MINORITY GROUPS DETRIMENTALLY AND INTENTIONALLY OFFENDED BY THE YBE'S UNCONSTITUTIONAL POLICIES AND PRACTICES

Contrary to petitioner's third argument, the following supports the district court and Court of Appeals' conclusion that blacks and Hispanics constituted the appropriate racial minorities in Yonkers:

1) both groups were concentrated in southwest Yonkers, the area of minority concentration, and both suffered from the conditions of segregation and educational inequality graphically depicted in the district court's opinion; *See,* 191a-192a.

2) white opposition to integration school policies, as the Court of Appeals properly stated, centered around both these minority groups, coupling them together as undesirables in a stereotypic manner;

3) the racial opposition to all proposals having desegregative consequences equally affected blacks and Hispanics, while YBE capitulation to such sentiments left both groups highly segregated in inferior educational facilities.

On these bases, the treatment intentionally accorded members of these groups differed adversely from that provided to whites, the vast majority of whom were educated in intentionally segregated, superior facilities in East Yonkers. *Keyes v. School District No. 1,* 413 U.S. 189, 197-98 (1973).

Finally, with respect to Asians, neither plaintiff suggested that Asians had been subjected to discriminatory treatment in schooling or housing in Yonkers. As school authorities did not concede any impermissible discrimination against Asians, this group was properly classified with the majority, in that its members suffered none of the

adverse effects visited upon Blacks and Hispanics. *Bradley v. Milliken*, 620 F.2d 1143, 1156 (6th Cir. 1980).

CONCLUSION

For all the reasons presented herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

(5) (3)

Nos. 87-1632 and 87-1686

In the Supreme Court of the United States

OCTOBER TERM, 1987

YONKERS BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

CITY OF YONKERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether petitioner Yonkers Board of Education may be held liable for causing the segregation of its school system on the basis of factual findings that the Board intentionally engaged in discriminatory acts and omissions and that it consistently rejected desegregative proposals because of the community's race-based opposition to such proposals.

2. Whether petitioner City of Yonkers may be held liable for causing the segregation of its school system on the basis of factual findings that city officials intentionally discriminated against minorities in choosing sites for public and subsidized housing, in part to prevent minorities from attending schools in white neighborhoods; appointed to the school board individuals who would support a policy of avoiding desegregation; and tried to influence school board decisions in order to maintain the status quo.

3. Whether petitioner City of Yonkers may be held liable for engaging in a pattern and practice of racial discrimination in the selection of sites for public and subsidized housing, in violation of the Equal Protection Clause of the Fourteenth Amendment and the Fair Housing Act, 42 U.S.C. 3601 *et seq.*, on the basis of, inter alia, factual findings that city officials consistently yielded to the community's race-based opposition to the development of such housing in white neighborhoods.

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In the Supreme Court of the United States

OCTOBER TERM, 1987

No. 87-1632

YONKERS BOARD OF EDUCATION, PETITIONER

v.

UNITED STATES OF AMERICA, ET AL.

No. 87-1686

CITY OF YONKERS, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITIONS FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 577a-716a) is reported at 837 F.2d 1181.[1] The opinion of the district court (Pet. App. 1a-532a) is reported at 624 F. Supp. 1276. The district court's order for desegregation of the Yonkers public school system (Pet. App. 533a-561a) is reported at 635 F. Supp. 1538. The district court's housing remedy order (Pet. App. 562a-576a) is reported at 635 F. Supp. 1577. The district court's supplemental order re-

[1] "Pet. App." refers to the appendix to the petition in No. 87-1632, unless otherwise indicated.

lating to the funding of the school remedy plan (87-1686 Pet. App. 763a-767a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on December 28, 1987. The petition for a writ of certiorari in No. 87-1632 was filed on March 26, 1988. On March 16, 1988, Justice Marshall extended the time for filing the petition for a writ of certiorari in No. 87-1686 to and including April 25, 1988. That petition was filed on April 12, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. On December 1, 1980, the United States filed its complaint in the United States District Court for the Southern District of New York against petitioners Yonkers Board of Education (Board) and City of Yonkers and Yonkers Community Development Agency (City) (Pet. App. 8a n.1). The complaint alleged that the Board and the City had engaged in intentional racially discriminatory acts and omissions that caused, in substantial part, the segregated condition of the Yonkers public schools, in violation of Titles IV and VI of the Civil Rights Act of 1964, 42 U.S.C. 2000c-6 and 2000d, and the Fourteenth Amendment (Pet. App. 188a-190a). The complaint further alleged that the City had engaged in a pattern and practice of confining public and subsidized housing to areas of Yonkers west of the Saw Mill River Parkway because of the race or color of the potential occupants, in violation of Title VIII of the Civil Rights Act of 1968 (Fair

Housing Act), 42 U.S.C. 3601 *et seq.*, and the Fourteenth Amendment (Pet. App. 14a-16a).[2]

Yonkers is one of the five largest cities in the State of New York (Pet. App. 11a). An "extreme degree of segregation * * * exists in Yonkers" (*id.* at 14a n.8). According to the 1980 census figures, the City's population of 195,331 was 18.8% minority; 80.7% of the minority population was concentrated in the City's southwest quadrant, which had a 40.4% minority population (*id.* at 11a, 13a). In contrast, only two census tracts outside Southwest Yonkers had a greater than 6% minority population (*id.* at 13a).[3] As of 1982, the southwest quadrant contained 36 of the City's 38 subsidized housing projects, roughly 97% of the housing units (*id.* at 12a-13a, 586a). During the 1960s and 1970s, when most of those projects were built, the City's minority population increased by 325%; 94% of that increase occurred in the Southwest and an adjacent census tract. Indeed, during this time the Southwest lost nearly half its white population. *Id.* at 164a-165a.

The Yonkers Board of Education, consisting of nine members appointed by the Mayor, operated a school system which, in 1980-1981, had 23 elementary schools, two combined elemen ary/middle schools, four middle

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[2] On March 1, 1981, the Yonkers Branch of the National Association for the Advancement of Colored People and an individual minority student, by her next friend, moved to intervene in the action as parties-plaintiff. On June 29, 1981, the district court granted leave to intervene and later certified the action as a class action on behalf of all black residents of Yonkers who were residents of, or eligible to reside in, public or subsidized housing in Yonkers, or who were parents of students attending public school in Yonkers. Pet. App. 8a n.1, 583a.

[3] The term "minority," as defined in the complaints and census data since 1970, included blacks and hispanics (Pet. App. 13a n.6, 683a).

schools, and five high schools (Pet. App. 198a-200a). The "racially segregated nature of the Yonkers public schools [was] systemwide" (*id.* at 202a). In 1980-1981, for example, 19 out of 25 elementary schools were over 80% white or over 80% minority, although the school system as a whole was 37% minority (*id.* at 204a).[4] The secondary schools also were segregated (*id.* at 205a).[5] Other indications of the segregated school system included racially identifiable faculty and staff assignments, generally less desirable physical facilities in minority schools, and the community's and school officials' perceptions of schools as either minority or white (*id.* at 205a-207a).

2. After more than 90 days of trial in 1983 and 1984, the district court issued an opinion on November 20, 1985, holding the City and the Board liable for the systemwide racial segregation of the Yonkers public schools and the City liable for a pattern and practice of racial discrimination in the selection of sites for public and subsidized housing (Pet. App. 1a-532a). On May 13, 1986, the court entered an order adopting a remedial plan for the desegregation of the Yonkers public schools (*id.* at

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[4] Nearly one-half of all minority elementary students attended five schools in Southwest and West Yonkers which were over 80% minority (Pet. App. 203a-204a). Over 70% of the white elementary students attended schools that were at least 90% white (*id.* at 204a-205a).

[5] The two East Yonkers middle schools enrolled between them only 5% of the school district's middle school minority students; the three middle schools in the Southwest, however, enrolled 79% of the district's middle school minority students (Pet. App. 205a). The remaining middle school in Northwest Yonkers had a 37% minority enrollment (*ibid.*). On the high school level, only 8% of the minority students attended the two East Yonkers high schools. The two West Yonkers schools enrolled 92% of the minority high school students (*ibid.*).

533a-561a); on May 28, 1986, the court entered a remedial housing order against the City (*id.* at 562a-576a).[6]

a. The district court's holding that the Board was liable for the segregated school system was supported by extensive factual findings. First, the court found a number of "[i]ndividual, deliberately segregative school opening, closing and attendance zone decisions" (Pet. App. 485a). "The consistent impact of these decisions * * * was to avoid the assignment either of Northwest Yonkers white students to disproportionately minority schools or of minority students to disproportionately white Northwest Yonkers schools" (*ibid.*). Second, the court found four areas in which the Board had engaged in "unlawfully discriminatory acts and omissions, all of which have had systemwide impact and have served to perpetuate racial segregation in public schools and discriminatory attitudes in the Yonkers community" (*id.* at 486a). These included the Board's refusal, because of racial considerations, to adopt educational reorganization plans that would have equalized educational opportunities in minority and white schools and would have had desegregative consequences (*id.* at 489a-505a). The remaining three areas of discrimination involved the assignment of faculty and administrative staff, the vocational education program, and the Special Education program (*id.* at 486a-488a).

b. The district court also made extensive factual findings in holding the City liable for the segregated school system. The court cited, among other things, city officials' intentionally segregative housing practices that it found

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[6] The latter order included supplemental findings that the City's pattern and practice of discrimination had continued in light of the City's refusal to submit a housing assistance plan and designate sites for subsidized housing in East Yonkers, as required by a contract for federal financial assistance (87-1686 Pet. App. 758a-759a).

were motivated, in part, by a desire to prevent minorities from attending schools in white neighborhoods; a pattern of mayoral appointments to the school board of individuals who would support a policy of avoiding desegregation; and city officials' attempts to influence school board decisions in order to maintain the status quo (Pet. App. 433a-438a, 456a-458a, 465a-467a). The court found that the Board and the City worked together to maintain the segregation of the Yonkers public schools in a manner that rendered the statutory legal separation between them "an artificial and constitutionally insignificant one" (*id.* at 500a).

c. The district court also held the City liable for engaging in a pattern and practice of racial discrimination in the selection of sites for public and subsidized housing. The court found a "remarkably consistent and extreme" pattern of rejecting integrative courses of action in favor of segregative alternatives and held that this pattern was unlikely to have occurred in the absence of racial motivation (Pet. App. 173a). In addition, the court found direct and circumstantial evidence of city officials' segregative intent. This evidence included the acquiescence in the community's racially influenced opposition to public and subsidized housing outside areas of minority concentration (*id.* at 173a-174a), the total absence of low-income family projects outside largely minority areas (*id.* at 163a), the inconsistent application of procedural rules depending upon whether the proposed housing site was east or west of the Saw Mill River Parkway (*id.* at 102a-106a), the frequent rejection of Planning Board recommendations that were inconsistent with a policy of segregation (*id.* at 48a), the creation of an atmosphere hostile to private development of low-income housing outside the Southwest (*id.* at 95a), and the reluctance to seek federal Section 8 housing certificates and, when they were obtained, the confining of

their use to minority families only in the Southwest (*id.* at 118a-130a).

3. Both the Board and the City appealed. In a lengthy opinion, the court of appeals affirmed "in all respects," concluding that the district court "properly applied the appropriate legal principles, that its findings of fact [were] not clearly erroneous, and that its remedial orders [were] within the proper bounds of discretion" (Pet. App. 583a).

ARGUMENT

As they have throughout this litigation, the Board and the City blame each other for the segregated Yonkers public school system. Each petitioner thus contends principally that the courts below erred in holding it liable for the discriminatory acts of the other. This fingerpointing, however, should not divert this Court's attention from the record, which contains substantial evidence of cooperative, intentionally segregative actions by both the Board and the City.[7] The district court, for instance, found that

> [w]hile a city's legal responsibility for the perpetuation of segregated schools cannot appropriately rest

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[7] The district court found that the "interrelationship between the City and the Board, and its effect on housing and school segregation, is illustrated with unmistakable clarity by the treatment accorded School 4" (Pet. App. 468a). Although the school, which the Board closed in 1976, should have been returned to the City for disposition, the Board cooperated with the City to prevent the site from being used for low-income housing by retaining control of the vacant school at an annual cost of $40,000 to $50,000 (*id.* at 468a-472a). Shortly after the City informed the Board that a developer was interested in the site for " 'luxury-type housing,' " the Board returned School 4 to the City (*id.* at 473a-474a). The actions of the Board and the City concerning School 4 provided a striking example of a "[d]eparture[] from the normal procedural sequence" which this Court has found to be a significant factor in proving circumstantially the existence of unlawful

> simply upon the imposition of vicarious liability for the independent acts and omissions of school officials who are responsible for and capable of changing this condition, to view the conduct of the Yonkers Board of Education independently of the circumstances and manner in which its members were selected would be to artificially separate city powers, policies and practices from educational affairs in a manner wholly inconsistent with the reality of public education in Yonkers.

Pet. App. 517a.[8] The court of appeals shared this assessment, commenting that "[w]hen two actors have cooperated in a given venture, each contributing to the outcome that each desires, it requires no stretch of legal doctrine to conclude that each actor is liable if the result deliberately attained is unlawful" (*id.* at 702a). The courts below agreed that the Board and the City had mounted "an interrelated governmental effort to preserve the integrity of 'neighborhood schools' whose racial segregation was governmentally sanctioned and steadfastly maintained" (*id.* at 500a, 704a), and thus held each petitioner liable for its own intentionally segregative contributions to the constitutional violation.

The decisions below are correct. They do not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

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discriminatory intent. *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 267 (1977).

[8] The court found that the City had exercised a "subtle, yet significant, segregative influence over educational affairs" (Pet. App. 518a). A former mayor of Yonkers stated that the City and Board worked together on educational matters as "one family" (Tr. 1251-1252).

1. The Board contends that the courts below improperly relied on the City's intentionally segregative housing practices rather than the Board's own actions (87-1632 Pet. 8-17), and on the Board's mere failure to eliminate disparities among its schools (*id.* at 17-20), in holding the Board liable for the segregation of the Yonkers public schools. The Board's claim is meritless. The courts below held the Board liable for causing the segregation of its school system on the basis of factual findings that the Board itself intentionally engaged in discriminatory acts and omissions and consistently rejected desegregative proposals in order to avoid the community's race-based opposition to such plans.

a. The Board is simply wrong to claim that its liability hinged on the City's segregative conduct rather than its own. As the court of appeals made clear, the district court had not (Pet. App. 702a-703a)

> impose[d] liability on the Board for segregation in housing [nor found] the Board liable for school segregation solely because the City was liable for intentionally preserving segregation in housing. Rather the court found many indicia of segregative intent on the part of the Board independent of any goal or view attributable to the City, and found the City's intent relevant, in major part, to an assessment of the Board's motivation in repeatedly refusing to take any desegregative steps.

The Board's adherence to a neighborhood school policy, which exacerbated the segregative effects of the City's intentionally discriminatory housing practices, was "hardly the only premise of the Board's liability" (Pet. App. 687a). Instead, evidence of the Board's selective adherence to that policy, "the consistent element being that deviations [from and] manipulations [of the policy] tended to increase the

racial imbalance in the schools" (*id.* at 689a), supported the finding of the Board's segregative intent. Such evidence included "segregation-enhancing school zone realignments" (*id.* at 686a), "race-based placement of minorities in special classes [outside of their neighborhood schools] and prejudice-enhancing treatment of those classes" (*ibid.*), and "systematic exclusion of minorities from vocational programs" (*ibid.*).

The Board's use of "race-based staff assignments" (Pet. App. 686a), a practice which this Court has recognized as "strong evidence" of intent to segregate students,[9] was yet further support for holding the Board liable where these staff assignments "enhanced the racial identifiability of most schools" (*id.* at 691a). Moreover, the Board's practices regarding staff assignments showed that many of the Board's "proffered rationales [for its policies] were pretextual" (*id.* at 693a-694a).

Finally, the record supported the conclusion that the Board's "desire to perpetuate school segregation was a motivating factor in [its] refusals to take any step that would have had a desegregative effect" (Pet. App. 697a). The courts below quite properly inferred the Board's intent to preserve segregated schools from the fact that the Board "consistently rejected, often stating reasons that were pretextual, any significantly desegregative alternative [to the neighborhood school policy] proposed to it" (*id.* at 689a).

Under the circumstances, the Board's renewed contention that the district court improperly held the Board liable for the City's discriminatory housing practices remains as "superficial and untenable" (Pet. App. 687a) as it

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[9] *Dayton Bd. of Educ.* v. *Brinkman*, 443 U.S. 526, 539 (1979); *Columbus Bd. of Educ.* v. *Penick*, 443 U.S. 449, 467 (1979); *Green* v. *County School Bd.*, 391 U.S. 430, 435 (1968).

was when raised before the court of appeals. The Board ignores the extensive factual findings outlined above which highlight the "many indicia of segregative intent on the part of the Board independent of any goal or view attributable to the City" (*id.* at 702a).[10]

b. The Board is similarly wrong in claiming that its liability depended on the finding that it failed to eliminate educational disparities among its schools. The factual findings outlined above, including the Board's selective adherence to the neighborhood school policy, the Board's race-based decisions on school openings and closings, and the Board's race-based faculty and administrative staff assignments, show that the Board's liability hinged on deliberately segregative actions apart from the Board's failure to upgrade the quality of its minority schools.

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[10] For this reason, the conflict the Board cites between the court of appeals' decision and decisions of the Fourth and Sixth Circuits is illusory (87-1632 Pet. 13-17). Each of the latter decisions either assumed or involved a school board that had no segregative intent or had taken no segregative actions. See, *e.g.*, *Goldsboro City Bd. of Educ.* v. *Wayne County Bd. of Educ.*, 745 F.2d 324, 331-333 n.15 (4th Cir. 1984) ("There is no evidence in the record that would support a finding that public housing was constructed in the City school district in order to concentrate black children in the City school system."); *Bell* v. *Board of Educ.*, 683 F.2d 963, 968 (6th Cir. 1982) (footnote omitted; emphasis added) ("We do not find any case addressing the argument that a school board *otherwise innocent of segregative intent* is liable for the discriminatory housing practices of other governmental agencies."); *Higgins* v. *Board of Educ.*, 508 F.2d 779, 788 (6th Cir. 1974) ("There is no indication that the school officials had any complicity in [the claimed] segregative acts."). In the present case, by contrast, the Board committed acts of intentional discrimination that caused the racial segregation of its school system. The Board blinks reality in suggesting that this case involves an imposition of vicarious liability.

To be sure, the courts below also concluded that the Board, although not responsible for causing the problem, tolerated educational disparities among its schools whose "existence * * * clearly worked to the disadvantage of minority students" (Pet. App. 492a; see *id.* at 292a-320a, 616a-617a, 686a-694a). The Board consistently rejected meritorious proposals designed to improve the quality of minority schools, not because of educational or fiscal reasons, but because of the community's opposition to desegregation (*id.* at 505a-506a, 694a-698a). Accordingly, the Board's consistent refusal to adopt any desegregative measures, "in the context of the totality of all of its actions and omissions" (*id.* at 505a), also contributed to the Board's liability for the segregation of the school system. The Board is simply mistaken in suggesting that a mere failure to remedy educational disparities was the touchstone of its liability.

c. The Board also renews its contention (87-1632 Pet. 21-24) that blacks and hispanics should not have been grouped together in considering whether the school system was racially segregated. In *Keyes* v. *School Dist. No. 1,* 413 U.S. 189, 196-198 (1973), this Court made clear that blacks and hispanics should be considered as one group, in the context of a claim of segregation, where the evidence showed that the school board had discriminated against both groups of students. The court of appeals, after reviewing the record, including evidence of hostility to hispanics as well as blacks, concluded that "[i]n all the circumstances, it would have been error for the district court to omit hispanics from the minority category in its analysis of whether the Yonkers public school system was segregated" (Pet. App. 684a).[11] This Court need not

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[11] The Board criticizes the grouping of Asians with whites and hispanics with blacks as "purely arbitrary and unwarranted" (87-1632

"undertake to review [the] concurrent findings of fact by two courts below." *Graver Mfg.* v. *Linde Co.*, 336 U.S. 271, 275 (1949).

2. The City contends (87-1686 Pet. 11-18) that the courts below held it liable for the segregation of the Yonkers public school system solely on the basis of the City's discriminatory site selection in public housing and the mayor's appointments to the school board. The City's argument is groundless. The courts below held the City liable for causing systemwide segregation of its school system on the basis of factual findings that city officials intentionally discriminated against minorities in choosing sites for public and subsidized housing, in part to prevent minorities from attending school in white neighborhoods; appointed to the school board individuals who would support a policy of avoiding desegregation; and tried to influence school board decisions in order to maintain the status quo.

a. Contrary to the City's suggestion, the record contains substantial evidence that city officials "made public housing site evaluation decisions for other than housing reasons" (87-1686 Pet. 12).[12] One former City Council

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Pet. 23). But the record contained no evidence of discrimination against Asians in the Yonkers school system. The district court and the court of appeals thus properly followed *Keyes* to include as minorities only those groups that had been victims of discrimination.

[12] The City may not complain that the courts below imposed liability solely because of its discriminatory housing practices. The district court eschewed reliance on a theory that "a city's discriminatory housing practices *alone* form an independent basis for a finding of city liability for school segregation" (Pet. App. 513a-514a (emphasis in original)). The court proceeded on the basis that the (*id.* at 514a)

> housing-related practices of City authorities, along with the various other methods by which City officials have influenced school district operations and thereby contributed to its racial

member testified that during his seven-year tenure on the Council nearly every Council member suggested that he was concerned about the racial makeup of schools when considering sites for public and subsidized housing (Pet. App. 433a, 701a).[13] City officials' attempts to influence school board decisions having a direct bearing on the racial enrollment patterns of the schools (*id.* at 465a-467a, 515a, 701a) not only showed the "City's awareness of the interrelationship between residential housing choices and the racial imbalance of the schools," but also provided "additional evidence of the City's segregative intent with respect to public schools" (*id.* at 467a).

The City cannot find a safe harbor in the Board's overall responsiblity for the school system because, as the district court found, the City itself "engage[d] in intentionally segregative conduct with respect to these schools" (Pet. App. 514a). For example, the City's direct involvement in the planning of School 10 rendered it liable for "the segregation of School 10 and surrounding schools" (*id.* at 516a; see *id.* at 239a-253a).[14] Indeed, the Board could not

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segregation, are all relevant in determining whether the City's acts and omissions as a whole have resulted in the intentional creation or aggravation of racial segregation in the Yonkers public schools.

[13] The former Council member explained that the City's housing segregation was designed in part to keep East Yonkers schools "nice" by excluding minority-occupied low-income housing (Tr. 986).

[14] The Board planned School 10 as a replacement for the physically inadequate facility of School 19 in Southwest Yonkers. The City persuaded the Board to locate the new school in the Riverview urban renewal area for reasons advantageous to both the City and the Board. The City, however, became increasingly involved in the planning and construction of the school and ultimately drastically reduced its site size and surrounded it with subsidized housing projects so that the school was barely visible from the street. These actions "under-

be held responsible for the segregated opening of School 10 because the Board had assumed a "subsidiary role in the decisionmaking process" in favor of the "predominance of the City's residential objectives" (*id.* at 252a). Thus, "the City's conduct with respect to [the] Riverview [housing projects] and School 10 [could] be viewed properly only as part of prior, contemporaneous, and subsequent housing practices which intentionally preserved racial segregation throughout the City as a whole" (*id.* at 516a).

b. The courts below properly relied on the "mayor's appointments to the Board of only persons who could be counted on to maintain segregation in the schools" (Pet. App. 704a) to support holding the City liable for intentionally causing segregated schools. The City's argument (87-1686 Pet. 15-17) that the lower courts imposed liability under a theory of vicarious liability, despite *Monell* v. *New York City Dep't of Social Services,* 436 U.S. 658 (1978), mispresents the decisions below. The City was not held liable for the manner in which the appointees exercised their authority once in office or on the ground that their conduct was "for[e]seeable" (87-1686 Pet. 16). The lower courts held the City liable on account of city officials' intent to "preserve segregation in the schools, both for the sake of the schools and for the sake of the neighborhoods" (Pet. App. 702a), an intent exemplified by the "mayor's forthright packing of the Board" (*id.* at 701a) with the persons he believed would reject proposed desegregative alternatives.

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mined" (Pet. App. 247a) School 10's potential for attracting students and required the Board to abandon its plans for closing School 19. School 10 and School 19 were, by 1976, two of the most predominantly minority schools in Yonkers (*id.* at 239a-252a).

Contrary to the City's contention (87-1686 Pet. 18), the examination of mayoral appointments as a means of ascertaining city officials' intent is not "judicial oversight of discretionary appointments" of the sort this Court discouraged in *Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974). As the court of appeals stated, this Court has not "forbid[den] judicial recognition of the pattern in which municipal discretion is exercised in order to fathom the municipality's underlying intent" (Pet. App. 704a). Indeed, as this Court has repeatedly recognized, litigation under the Equal Protection Clause necessarily requires an inquiry into the actions taken by state actors. *E.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 264-268 (1977).[15]

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[15] The City also argues (87-1686 Pet. 18-22) that the lower courts improperly required the City to disprove the need for allegedly unnecessary elements of the voluntary desegregation remedy. The City neglects to mention that it chose not to participate substantively in the school remedy proceedings before the district court (Pet. App. 533a-534a, 658a, 713a). The City raised its belated claim that the Board's proposed desegregation budget was excessive only after the district court had completed the proceedings and had entered a remedial order (*id.* at 658a; 87-1686 Pet. App. 763a-764a). The court, having already found that the budget was "reasonable and necessary" to the plan's implementation (87-1686 Pet. App. 763a), nevertheless invited the City to produce evidence that would show whether any aspect of the budget was unnecessary or duplicative. The City and the Board, however, resolved their funding dispute by consent (87-1686 Pet. 7-8 n.5), and thus the court was not required to resolve it. Under these circumstances the issue the City raises before this Court is not presented by the record.

The only funding dispute remaining among the parties, which involves the City's obligation to fund two new schools, is currently pending in the Second Circuit. *United States* v. *Yonkers Bd. of Educ. & City of Yonkers*, Nos. 87-6070 and 88-6078 (appellee's brief filed May 9, 1988).

3. The City also contends (87-1686 Pet. 23-29) that the courts below erred in holding the City liable for segregated housing "based on the expressed opposition of members of the community, and not public officials, to placement of low income housing on the East side of Yonkers" (*id.* at 23). The district court found intentional discrimination based not only on the City's yielding to the community's race-based opposition to public and subsidized housing outside Southwest Yonkers, but also on the City's consistent series of housing site decisions explainable only in terms of race, a pattern of specific departures from ordinary procedures compatible with that discriminatory policy, and a string of pretextual justifications for the City's actions (Pet. App. 172a-187a). Similarly, the court of appeals made clear (*id.* at 674a-682a) that it relied on the City's deference to the community's racial animus because the court found that "a discriminatory purpose [was] a motivating factor" in the City's decision-making process (*Village of Arlington Heights*, 429 U.S. at 265-266). The lower courts' straightforward and entirely correct applications of this Court's precedents warrant no further review.

The City also contends that the district court made "no findings that any municipal official [had] intentionally discriminated" (87-1686 Pet. 27). As the court of appeals recognized, however, the "City's view of the facts and the findings [of the district court] is untenable, for it is plainly contradicted by the district court's well documented opinion" (Pet. App. 675a). The district court found that certain city officials had acted out of a belief that "racially influenced opposition to subsidized housing in East Yonkers [was] a 'fact of life' " (*id.* at 64a), and that they therefore had decided to concentrate building such housing in pre-

dominantly minority areas of Yonkers (*ibid.*).[16] Moreover, the district court had found that "numerous City officials not only responded to, but * * * 'led the fight against subsidized housing in East Yonkers' " (*id.* at 181a). In sum, the record amply supports holding the City liable for engaging in a continuous pattern of intentional discrimination in its housing policies in violation of the Fourteenth Amendment and the Fair Housing Act.

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[16] During the 30-year period examined by the district court, every site the City selected for low-income family housing was in the Southwest, adjacent to census tract 7, or heavily minority Runyon Heights (Pet. App. 12a-14a). Indeed, the court specifically rejected as pretextual the City's defense that its site selection policy was part of a comprehensive development plan (*id.* at 105a-117a, 118a-130a, 179a-185a). In addition, the City consistently approved unsuitable sites in the Southwest for public housing while rejecting sites in the East and Northwest (*id.* at 100a-103a). The City also took whatever actions were necessary to spur development of low-income housing in the Southwest but stifled building plans east of the Saw Mill River Parkway (*id.* at 102a-106a, 147a-149a, 150a, 151a-162a).

CONCLUSION

The petitions for a writ of certiorari should be denied.
Respectfully submitted.

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MAY 1988

U.S. GOVERNMENT PRINTING OFFICE: 1988 - 202 037/60465

(6)

No. 87-1632

Supreme Court, U.S.
FILED
MAY 24 1988
JOSEPH F. SPANIOL, JR.
CLERK

In The
Supreme Court of the United States
October Term, 1987

CITY OF YONKERS AND YONKERS COMMUNITY DEVELOPMENT AGENCY,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent,

and

YONKERS BRANCH, NAACP, ET AL.,

Respondent.

RESPONDENT YONKERS BRANCH NAACP, ET AL'S OPPOSITION TO PETITION FOR WRIT OF CERTIORARI BY CITY OF YONKERS AND YONKERS COMMUNITY DEVELOPMENT AGENCY

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OPINIONS BELOW

On January 28, 1988, the district court entered a Consent Decree signed by the City of Yonkers (hereinafter the "City"); the United States and the Yonkers Branch, NAACP, et al. (hereinater "NAACP") which is attached hereto in full.

STATEMENT

1. In December 1980, the United States of America filed suit alleging, *inter alia*, that Yonkers has intentionally confined assisted housing to minority identified

neighborhoods in southwest Yonkers and refused, in part for racially motivated reasons, to allow the placement of such housing in three quarters of the City, those quadrants overwhelmingly populated by white persons.

2. In July 1981, the district court granted the motion of the Yonkers Branch, NAACP, et al., to intervene in these proceedings and, in 1982, their motion for class certification on behalf, as relevant here, of minority (black and Hispanic) residents of Yonkers eligible to reside in assisted housing.[1]

3. The matter proceeded through extensive discovery and pre-trial motion practice and came on for trial in August 1983. Trial lasted some 92 days with more than 80 witnesses and thousands of exhibits.

4. At trial, numerous former and current City officials admitted that racial discrimination played a substantial, indeed overwhelming, role in site selection decisions.[2] For instance, Morton Yulish, former Director of Yonkers' Department of Development, a predecessor

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1. As used in this litigation, assisted housing comprehends housing built pursuant to the Public Housing Act of 1937, as well as other federal and state subsidy programs, including section 236; section 8 new and substantial rehabilitation and Mitchell-Lama.

2. Among these officials were; Alfred Del Bello, then Lieutenant Governor of New York and formerly Mayor and councilman in Yonkers; Andrew O'Rourke, currently County Executive, Westchester County, and formerly City Councilman, Yonkers; Dominick Iannocone, former Vice Mayor and Majority Leader; Angelo Martinelli, long-time Mayor of Yonkers; Morton Yulish, former Director, Department of Development; Walter Webdale, former Director, Department of Development and Urban Renewal Agency; Herman Keith, former employee of Yonkers CDA; Philip Pistone, Director of Planning Department since 1957; Nicholas Longo, City Council Member; John Hanney; former City Council member; Michael Cipriani, City Council member and, through depositions, many other members of the City Council.

of the Community Development Agency (hereinafter "CDA"), testified that in his many discussions with east side City Council members, they repeatedly vetoed the location of assisted housing in their wards because of the vehement, racially-based opposition of their constituents. 62a-63a; 80a-88a.* Herman Keith, a former employee of CDA and a past President of the NAACP Branch, testified that through the 1970's, several City Managers acknowledged to him the desirability of providing more scattered sites for assisted housing, but indicated that in light of the fervent racially-based opposition to any such construction, it was simply impossible.

Political leaders told the district court much the same story.[3] One, Dominick Iannocone, former Vice Mayor and majority leader of the City Council, testified that he had conversed with each east side council member concerning the placement of assisted housing in their wards and that each told the same story: their constituents harbored fears of prospective minority residents whom they associated with assisted housing. They opposed residential integration on this ground, making its provision politically impossible.[4] In addition, according to Iannocone's

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*References are to Appendices submitted by Yonkers Board of Education accompanying its Petition for Writ of Certiorari.

3. The district court's detailed review of the relevant evidence may be found at 21a-162a.

4. Ianoconne testified that he, too, had blocked the placement of a public housing project in an overwhelmingly white section of his ward after local residents raised fears of racial incursion with him. Instead of publicly expressing the true basis for his action—a desire to cater to the wishes of these constituents knowing full well their racially discriminatory motivation—Iannocone testified that he used parliamentary procedures to "bury" the site in question and to block its consideration. In addition, he simply made up pretexts to use in opposing the site, knowing all the while that his opposition was the direct consequence of the racially motivated community opposition to the site (74a-76a).

unrefuted trial testimony, council members intended, by maintaining these white neighborhoods free of assisted housing, to insure the continued segregation of area public schools. 73a-77a.

Despite the intensity of this racially-based opposition to publicly-assisted housing, the Yonkers Municipal Housing Authority and other agencies proposed to the City Council numerous sites for assisted housing in east and Northwest Yonkers. Indeed, the district court carefully traced the submission and consideration of these sites over a more than thirty year period, finding that perfectly appropriate sites were repeatedly rejected for racially discriminatory reasons and that neutral factors both favored the use of many of these sites and disfavored the municipal practice of concentrating assisted housing in a roughly one square mile area of minority concentration in and around Getty Square, the City's oldest section.[5]

5. The district court concluded that the City's policy of placing assisted housing - some 38 projects with 6600 units - in one quadrant of the City was both racially motivated and had stark racial impact. Members of the City Council vetoed other locations for racial reasons and found it more politically practical to overwhelm those

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5. On this last issue, the district court found that the city's own planners voiced strong disagreement with the concentration of assisted housing in southwest Yonkers, predicting (correctly) that such a concentration would confirm the racial identifiability of such areas—for minorities—and accelerate white flight (107a-117a). At the same time, the repeated racially-motivated rejections of appropriate sites elsewhere in Yonkers had a reciprocal effect: reinforcing, by official imprimatuer, the all white nature of those neighborhoods and signalling minorities and whites that government supported the discriminatory private housing practices which the record also reflects in graphic and shocking detail.

voices in the minority community who opposed the concentration of assisted housing. The city intended, through this practice, not merely to segregate housing patterns, but to insure continuing public school segregation. And, the segregative impact was clear: both direct and indirect. On the one hand, the white neighborhoods retained their overwhelmingly homogenous racial character; on the other, the minority areas became more densely populated and increasingly black and Hispanic.

6. The district court also considered the interrelationship between the allegedly independent Yonkers Board of Education (hereinafter "YBE") and the City of Yonkers. Noting the financial dependency of the YBE and the Mayor's unfettered power of appointment of YBE members, the district court found that, with his own election as Mayor in November 1973, Angelo Martinelli began a concerted effort to affect the policies of the YBE. 44a-458a. To this end, he intentionally replaced members who favored implementing integrative policies with persons he knew to be staunchly opposed to any alteration of the status quo. 444a-458a. The Mayor declined to reappoint outstanding school board members because they favored one or another plan to better utilize school facilities, a consequence of which might have been school integration. The Mayor also specifically opposed desegregative policies and intruded into the affairs of the YBE. In short, the district court concluded, "Here there is a pattern of appointments, reappointments, and failures to appoint over time, with the consistent result of impending the efforts of the school district to address the racial balance of the schools. In addition, the appointment of Board members must be viewed not in isolation but in conjunction with other contemporaneous occurrences in the city. The increasing efforts to establish a Board firmly committed to neighborhood schools dovetailed neatly with

the City's most concentrated development of family-populated subsidized housing projects in southwest Yonkers. . . .and the subsequent resistance to the development of subsidized housing in East Yonkers. . . ." 457a. When combined with the intentionally segregative impact of municipal housing policies, the Mayor's use of his appointment power caused the district court to hold the City liable for school segregation as well as housing segregation.

7. The City appealed the district court's opinion of November 20, 1985 to the Court of Appeals for the Second Circuit. In its appeal, the City specifically declined to challenge any of the district court's findings of fact as clearly erroneous and, instead, asserted that, as it had no obligation to construct assisted housing, the fact that it did so in an intentionally segregative manner did not make out either a statutory or constitutional violation. The Court of Appeals squarely rejected this argument and found fully supported both the district court's findings of fact and its legal conclusions.[6]

8. With respect to the City's responsibility for school segregation, on appeal, Yonkers did not challenge the district court's fact-finding as clearly erroneous, conceding that the record fully supported its determination as to the intent and effect of the Mayor's. Instead, in the Second Circuit, the City submitted that the district court

6. The Second Circuit held that a municipality which builds assisted housing may not "proceed with segregative intent and effect to confine housing for minority occupancy to areas in which minority residence is already concentrated, thereby enhancing and perpetuating racial segregation in residential patterns. *Otero v. New York City Housing Authority*, 484 F.2d 1122 (2d Cir. 1973). Yonkers does not contest this conclusion directly in its petition.

overstepped its role by inquiring into the Mayor's motives in making YBE appointments. The Court of Appeals affirmed the findings of fact made by the district court, 644a-648a, and agreed that the Mayor had used his appointive authority "as a means of furthering the city's segregative objectives." 656a. It also found this evidence of segregative intent admissible, distinguishing this suit from one seeking to enjoin specific mayoral appointments, *Cf., Mayor of Philadelphia v. Educational Equality League, 415 U.S. 605, 615 (1974).* In short, the Second Circuit could find "nothing [which] forbids judicial recognition of the pattern in which municipal discretion is exercised in order to fathom the municipality's underlying intent. The ineluctable conclusion that Martinelli's appointments were made with segregative intent supports the district court's conclusion that the segregated state of the Yonkers public schools - resulting from the City's confinement of minority housing to already minority neighborhoods and from the Board's adherence to a neighborhood school policy, its discriminatory faculty assignment and special program policies and its failure to take any steps to achieve school desegregation - was not simply coincidental." 704a.

9. In short, the Court of Appeals concluded that Yonkers had intended, through its housing policies, to insure the perpetuation of public school segregation and that Mayor Martinelli had further insured this outcome through his selections to the YBE.

10. In light of the egregious violations of constitutional rights committed by Yonkers, the district court entered a comprehensive housing remedy order on May

28, 1986.[7] The Court of Appeals upheld the propriety of each aspect of that order, including those which specifically required the City to fund the school desegregation plan.

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7. In accepting further Community Development Block Grants (hereinafter "CDBG") from HUD in July 1980, Yonkers agreed to the administrative condition that it build 100 units of assisted housing in East Yonkers when funding became available. In 1981 and 1982, HUD conditioned Yonkers' receipt of CDBG monies on the City's express promise to build 200 units of assisted housing. Again, in those years, no federal monies for this purpose were made available.

In February 1984, the Yonkers Branch, NAACP signed a Consent Decree with added-defendant, the Department of Housing and Urban Development which, *inter alia*, reserved funds sufficient for the construction of 200 units of public housing in East Yonkers. Under the terms of this Decree, approved by the district court in March 1984 after a fairness hearing, HUD notified Yonkers of the availability of these federal funds and required the City to submit appropriate sites. The City failed to timely submit sites. Finally, when faced with further administrative sanctions, the City submitted two sites which HUD eventually rejected as entirely inappropriate and inconsistent with the integrative intent of the CDBG conditions.

By May 1986, the date of the housing remedy order, Yonkers had failed to submit any appropriate East Side sites to HUD for public housing. The district court's remedy order incorporated this requirement, giving Yonkers ninety days to comply. The City refused to submit any sites, violating the district court's remedy order. Before doing so, Yonkers unsuccessfully sought a stay of this aspect of the remedy order in the district court; the Court of Appeals and in this Court.

Yonkers' refusal to comply with the housing remedy order continued through 1987. In January 1988, the City finally agreed to locate the 200 units of public housing on seven specific sites in East Yonkers. This agreement is the subject of the January 28, 1988 Consent Decree. Attachment A hereto. In this Decree, Yonkers expressly waived its right to seek further appellate review of any issue relating to the placement of these 200 units of public housing, whether of its underlying liability which predicated this remedy or the quantum and means of implementing this remedy. *See*, Section 10. Thereafter, citing vociferous community opposition to the terms of the Consent Decree, Yonkers moved the district court to vacate this waiver provision. Sec-

11. In the same opinion which found the City liable for housing and school segregation, the district court found the YBE liable under the 14th Amendment for the segregation of minority school children, as well as the denial of equal educational opportunity to those children. To remedy these violations, the court directed the defendants to submit plans. The City submited no proposal. The YBE offered its so-called Educational Improvement Plan (hereinafter "EIP"). The City filed no comments concerning the EIP and, during remedial hearings held in April 1986, its counsel raised no objection to the plan, other than the City's general contention that it should not be required to fund *any* desegregation plan. The district court rejected that argument and ordered the City to fund the necessary operating and capital expenses associated with the desegregation program. That program included the following central features: closing of four elementary schools; three junior high schools and one high school; re-

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tion 10 of the Decree. The district court denied that motion and the City has not appealed that denial to the Court of Appeals. Accordingly, here the City is bound by the Consent Decree not to raise any issue relating to its obligation to construct 200 units of public housing in East Yonkers or the agreed-upon means of implementing that consensual resolution.

With respect to other aspects of the remedy order, the City has likewise failed entirely to develop (as it was required to do by November 15, 1986) a long term housing remedy. By order of February 1987, upon plaintiffs' motion for relief from the City's contemptuous failure to implement the remedy order, the district court approved the appointment of an Outside Housing Advisor to perform the tasks required under the remedy order of the City. To date, the district court has not ordered implementation of a final long term housing remedy plan. In January 1988, the City agreed to the principal components of such an order, but then refused to finalize any Decree on this issue. Currently, pending before the district court is Plaintiffs' joint motion for entry of a long term housing remedy order.

drawing of boundary lines for junior and senior high schools so as to create integrated attendance zones; introduction of specialized magnet programs in six identifiably minority elementary schools; encouragement of minority students to transfer from these six elementary schools to overwhelmingly white schools in East and northwest Yonkers through active recruitment, curricular innovation and provision of free transportation; active encouragement of white students to choose one of the six minority area elementary magnet schools, and construction of two new schools, one to replace a long deteriorated minority area elementary school, # 19, and the other to house magnet programs for junior high school students in a manner to be coordinated with the Hudson River Museum, a major cultural institution on the City's west side. The district court entered specific findings that the plan, with its diverse features, was necessary to desegregate the Yonkers public schools and required the City to provide additional operating funds necessary to its implementation, as well as capital resources needed to refurbish and modernize certain aging facilities and to construct the two new schools.

12. While the district court's orders of May 28, 1986 and July 1, 1986 clearly require city funding of these elements, the district court effectively stayed the construction of the two new schools until the City could present further argumentation as to their necessity and cost. In February 1988, after referring this matter to a court-appointed Monitor who held proceedings on city objections to the new schools, the district court adopted the Monitor's recommendation, again ordering that both schools be built as originally contemplated in the May 13, 1986 school desegregation order. The City is currently appealing the propriety of the order that it fund the construction of these two new schools in the Court of Appeals for

the Second Circuit.[8]

13. In its appeal of liability and remedy orders to the Court of appeals, the City challenged the district court's requirement that it fund a more expensive voluntary desegregation plan, as opposed to a fully mandatory plan, which would have relied exclusively on busing, and not on creating programs designed to attract pupils to opposite race schools. Rejecting this argument, the Court of Appeals noted that the City did not support a more mandatory plan in the district court and that such a plan was "not a remedy the City at all prefers". 712A. Moreover, the Court of Appeals found that "[I]n selecting the desegregation plan ordered here, the district court plainly made appropriate efforts to eliminate any expense that was not necessary to remedy the violations found and to minimize the degree to which the remedy would interfere with the autonomy of the City and the Board." 712A-713A. Finally, the Court of Appeals found that, while more expensive than a fully mandatory plan, the voluntary plan "is both less intrusive and more likely to achieve long-term success in desegregating the public schools". *Id.*, and rejected Yonkers' suggestion that, by requiring its funding, the district court had abused its discretion.[9]

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8. The City's reply brief in that matter is due on May 23, with oral argument slated in the Court of Appeals on June 3, 1988. The issue before the Court of Appeals is whether, in requiring the two new schools, the district court properly found that they were desegregation related and necessary to the efficacious implementation of the school desegregation plan.

9. The City's Petition (at 9) inaccurately summarizes the Court of Appeals' reasoning on this matter, relating that that Court simply relied upon the City's responsibility for funding the YBE as a basis for the order that it fund an admittedly more expensive plan. To the contrary, the Court of Appeals held that (a) the City itself had never sup-

REASONS FOR DENYING THE PETITION

In support of its petition, the City raises three arguments, none of which merits review by this court on this record. First, Yonkers questions whether a city can be held liable for school segregation where the Board of Education has committed independent segregative acts. Second, Yonkers asserts that, absent findings of their necessity, it may not be ordered to pay for (unspecified) elements of a more expensive voluntary desegregation plan, as opposed to a less expensive one. Third, Yonkers denies that it may properly be held liable for a violation of the Fourteenth Amendment based on governmental acquiescence to racially-based community opposition to the placement of assisted housing in white neighborhoods.

Contrary to Yonkers shrill assertions, the district court and the Court of Appeals for the Second Circuit properly decided each of these issues and the City cannot point to any conflict among the circuits with regard to any legal principle relied upon here.

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ported a cheaper, more mandatory plan below; (b) on the evidence before him, the district court properly concluded that a voluntary plan, particularly at the elementary school grades, had a better chance to yield long-term remedy of the constitutional violations than did a more mandatory approach and (c) that, contrary to the City's suggestion, the district court had insured minimal intrusion into local affairs, focusing merely on insuring the City's allocation of those funds necessary for desegregation and declining to otherwise become embroiled in the annual conflicts between City and YBE over operating budgets (712a-713a).

I. THE CITY'S LIABILITY FOR SCHOOL SEGREGATION WAS PROPERLY FOUNDED UPON THE EFFECT OF ITS OWN UNCONSTITUTIONAL CONDUCT

The district court found that City officials intended, through segregative housing practices, to insure the perpetuation of public school segregation in Yonkers. (500a) Moreover, the district court found, as a matter of fact, that through its exclusive placement of assisted housing for families in southwest Yonkers, the City had intentionally exacerbated and perpetuated school segregation. Finally, the longtime Mayor replaced school board trustees committed to rectifying unequal educational opportunity and segregation with persons committed to insuring preservation of the racial status quo. Yonkers challenged none of these findings of fact in the Court of Appeals and is not now challenging any of them.

Instead, Yonkers submits that no decision of this court has ever held a municipality liable for a violation of the Fourteenth Amendment on these grounds. To the contrary, this court has long since recognized that housing-related practices which intentionally foster school segregation may predicate liability for the unconstitutional condition. *Milliken v. Bradley,* 418 U.S. 717 (1974). Moreover, in *United States v. Board of School Commissioners of Indianapolis,* 573 F.2d 400 (7th Cir., *cert. denied,* 439 U.S. 824 (1978), suburban school systems were held liable under the Fourteenth Amendment in part because their communities resisted the efforts of the Housing Authority of the City of Indianapolis to place assisted housing in their midst and so contributed to the confinement of blacks in the central city school district and, reciprocally, to the overwhelmingly white nature of those suburbs.

In addition, the City's suggestion that the district court and Court of Appeals abdicated their proper role by failing to "first determine whether there was any action in the conduct of the business of the [City] which [was] intended to, and did in fact, discriminate against minority pupils, teachers or staff." *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 420 (1977) is baseless. Both courts below found that the City's actions in the housing sphere were motivated, in part, by a desire to maintain segregated schools, an obvious act of discrimination against minority pupils.[10] And, through his exercise of the appointment authority, the Mayor clearly affected the policies and practices of the YBE, his principal goal as he remade that Board in his own image. Again, the courts below squarely held, as a matter of fact, that to remake educational policy in a segregative manner was a primary objective of Martinelli's and one which the Mayor accomplished.

In short, applying the principles articulated by the City itself, the courts below found that the City's practice of segregating assisted housing on the basis of race clearly

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10. Nor is either decision below based on "foreseeability" analysis. The district court, crediting the testimony of former Vice Mayor Dominick Iannacone, found that City officials intended to maintain school segregation and that this motivation informed their pursuit of municipal housing policies. The City's distortion of the impact of the Court of Appeals' decision (at 13) misrepresents the foundation of that Court's ruling which fully embraced prior decisions of this court requiring a finding of intent for a Fourteenth Amendment violation. *See,* 701a where Court of Appeals recites that "Nearly all of the Councilmen from East Yonkers stated explicitly that their constituents opposed minority housing in their neighborhoods in part because they sought to keep minority children out of their schools" as one piece of support for its conclusion that the City "deliberately sought to preserve segregation in the schools, both for the sake of the schools and for the sake of the neighborhoods." (702a).

and intentionally contributed to the offensive condition: segregation of minority pupils by dint of state action. That the School Board also acted with discriminatory intent no more undercuts these findings than did, for instance, the Sixth Circuit's affirmance of state liability in *Reed v. Rhodes,* 662 f.2d 1219 (6th Cir.1981) *Cert. denied* 455 U.S. 1018 (1982), in any way require modification of its prior ruling that the Cleveland School Board had intentionally segregated pupils on the basis of race.

II. THE PARADE OF HORRIBLES ENVISIONED BY THE CITY IS FAR-FETCHED AND OFFERS NO BASIS FOR REVIEW OF THIS MATTER.

The City suggests that the sound opinions below "lead to virtually limitless liability for any city which is found to contribute to segregated housing patterns." (Brief at 14). In fact, the conditions found in Yonkers were and are extreme - of the thirty eight housing projects built since the 1940's, all were located in areas of minority concentration but one (a senior citizen project in East Yonkers). Repeatedly, as the evidence marshalled below makes clear, proposals to utilize sites outside areas of minority concentration were made and rejected for no neutral, non-racial reason. The district court properly concluded that insuring segregated schools was a principal objective of the white community, which, acting through its council members, successfully resisted assisted housing in white neighborhoods. In short, in such extreme situations a finding of liability of elected municipal officials for school segregation is fully warranted. It cannot reasonably be submitted that liability here is improper because other, closer cases might demand different outcomes. The issue is not what a district court might do where the effect of the municipal housing policies are "minor," for here the courts below concluded, and Yonkers does not challenge

the finding is clearly erroneous, that the effects of segregative housing practices profoundly influenced and insured school segregation.

III. THE DECISIONS BELOW DO NOT INVADE THE MAYOR'S APPOINTMENT AUTHORITY

In assessing the presence of segregative and discriminatory municipal motivation, the district court analyzed Mayor Angelo Martinelli's appointments to the School Board between 1974 and 1980. The district court found that the Mayor used as a litmus test a potential candidate's opposition to "busing" and that he rid the YBE of all members committed to dealing with the twin problems of educational inequality and segregation. The City suggests that this inquiry strikes at the heart of local control of educational functions and the process of local control over schools. Petition at 14-15.

This contention is without foundation, and indeed, rather ironic. The City loudly relies upon the so-called independence of the YBE, but never challenges as clearly erroneous the district court's conclusion that the Mayor deeply politicized the YBE and, in fact, exercised control over its policies through his appointments.

Here plaintiffs did not seek to enjoin appointments to the YBE or any other city board. They engaged, instead, in a careful analysis of the Mayor's exercise of discretion to determine what could reasonably be concluded as to his and the City's intent. What came clear and what the City never challenges is that, despite the alleged independence of the YBE, as a policy-making body under state law, Mayor Martinelli himself determined the direction of the Board on critical matters of educational and social policy and insured that persons he appointed shared his outlook

and commitment to oppose integrative measures. This process coincided with other segregative municipal actions: i.e., rejection of the section 8 existing housing program and placement of all assisted housing in southwest Yonkers.

Having analyzed the circumstances and nature of these appointments, the district court found that they had evidentiary value, confirming the City's discriminatory and segregative design. The Court of Appeals agreed.[11]

The City submits that relying upon evidence as to the nature of the Mayor's discharge of a discretionary act is improper. Instead, it suggests that evidence that state actors have violated the Constitution by their own conduct is required. But, this argument is circular. The courts found that the Mayor had the authority to control appointments and did so with a specific discriminatory and segregative intent. The City fails to challenge this factual finding, which, of course, relates to the Mayor's *own conduct*.[12] Liability here does not attach because of the foreseeable conduct of appointees; rather, it stems from the inten-

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11. Again, the City's suggestion (Petition at 15) that foreseeability analysis underlies the intent findings in this area is fallacious. The courts below found that the Mayor formed a clearly segregative intent in making these appointments and that predictably those he appointed, after application of his litmus test, acted as expected.

12. The City's arguments as to control over the School Board is misplaced. First, as it fully controlled the YBE's operating and capital budget, the City obviously had considerable leverage over the full panoply of YBE affairs. But, second, the courts below found that, having re-oriented the YBE through his appointments, the Mayor had no need to exercise more day to day control. Instead, as we demonstrated in our Brief opposing the YBE's petition to this court for review, the Martinelli appointees did his bidding on the YBE with little direct interference from him.

tionality with which the Mayor acted. *Cf. City Petition* at 16.[13]

Equally groundless is the City's contention that here the district court held it liable when another entity had legal responsibility for the underlying unconstitutional conditions. Petition at 17. The City cites to *Milliken v. Bradley, supra.*, for this proposition, but there, this Court determined that suburban school districts, never afforded due process, could not be included in a school desegregation remedy as a means of providing an integrated education for minority students from Detroit. Here, the City was a full party to all proceedings and as the Court of Appeals affirmed, "When two actors have cooperated in a given venture, each contributing to the outcome that each desires, it requires no stretch of legal doctrine to conclude that each actor is liable if the result deliberately attained is unlawful." 702a. And, here, the "City sought unabashedly to have the Board do its bidding by preserving neighborhood schools in part in order to preserve the segregated residential patterns" which it had created. 704a.[14]

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13. This makes irrelevant the City's suggestion that under *United States v. Pate*, 324 F.Supp. 935, 939, *aff'd.*, 400 U.S. 806 (1970) public officials are presumed to act in good faith and lawfully. The issue is not how the Mayor assumed certain persons would act, but how he intended them to act in light of his intimate knowledge of them and the rationale for their appointment.

14. The City suggests that the opinion below contradicts the principle that a federal court may only remedy discriminatory conduct in the administration of a state law or program against those officials empowered to administer that law or program." Petition at 17. Again, it is the City's formulation that is inconsistent with precedent. In many school desegregation cases, states have both been found liable for school district segregation and ordered to fund remedies despite their lack of direct control over school district programs.

IV. THE CITY'S ATTACK ON THE FUNDING ORDERS IS DISINGENUOUS AND DOES NOT RAISE ANY UNSETTLED ISSUE OF CONSTITUTIONAL LAW

Having found Yonkers liable with the YBE for massive school segregation, the district court required local defendants to formulate, in the first instance, an appropriate remedy. In response, the YBE submitted a plan calculated to desegregate elementary schools in a voluntary manner. The City neither resisted the specifics of this proposal nor offered any alternative.

The district court properly found that a systemwide school desegregation remedy was appropriate.[15] The plan implemented through the May 13, 1986 Order is appropriately systemwide in effect and promises to work. In approving it, the Court of Appeals specifically noted that the district court properly preferred this approach to one which simply re-assigned students in part because this plan had a greater probability of long-term success.

Yonkers now submits that a mandatory reassignment remedy would have been less expensive and, in an incredible distortion of events, suggests that "the Board eagerly incurs additional expenses - including the construction of new schools - which it passes on to the City." Petition at

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15. The YBE does not raise any challenge to the scope of the court-ordered remedy in its Petition, but, rather contests the bases of its liability, as found below.

19.[16] In fact, the requirement for two new schools was an "integral" part of the *initial* remedy order, not an additional or new expense. Through it, the district court insured the replacement of a dilapidated school, #19 which, in later proceedings, the City's own expert, Dr. Robert Dentler, stated was inadequate on every standard used for judging school facilities. Moreover, the YBE had proposed razing and replacing this minority-area facility as early as 1967. In addition, as part of the original school desegregation order and both to redress the imbalance in burden placed on minority students through the closing of three southwest Yonkers junior high schools (Longfellow, Fermi and Hawthorne) and that quadrant's only high school (Yonkers High School), and to provide a suitable location for the junior high school gifted and talented program and a junior high school magnet program in the sciences, the district court approved the YBE's proposal to construct the Hudson River Museum School.[17]

In neither 1986-87 nor 1987-88 did the City raise issue concerning any allegedly excessive funds requested by the YBE to implement school desegregation programs. No such dispute is before this court. Instead, the City requests this Court, in the absence of a live dispute, "to determine

16. In fact, since the start of the plan, the YBE, with the support of the plaintiffs, has made several changes calculated to save the City millions of dollars, most notably retaining the Saunders Trade and Technical High School at its former location and not moving it to the site of the old Yonkers High School, while reciprocally re-locating Burroughs Junior High School to the latter site.

17. The City is currently appealing the propriety of the district court's 1987 and 1988 orders requiring, when taken together, funding of the two new schools. It cannot be heard here on that issue as well.

under what circumstances a federal court may order expenditures beyond the constitutionally required minimum in cases involving non-busing desegregation remedies." Petition at 20. But, as there is no live issue for resolution, either as between the YBE and the City or between the City and the district court, this Court should decline any such abstract invitation. The fact is the City does not object here to any specific aspect of the funding order and, without some specific and concrete objection, deliberated and ruled upon by courts below, this court should not issue an advisory opinion.

1. While we agree that courts should exercise their equitable authority to remedy constitutional violations, it is patent that gross constitutional violations here occurred and the voluntary remedy is precisely tailored to its elimination. None of this court's prior cases counsel for the expenditure of the "constitutional minimum"; rather, the remedy for unconstitutional segregation must "promise to work", *Green v. County School Board,* 391 U.S. 430 (1968) and, as the Court of Appeals here found, the plan ordered by the district court has that virtue. 713a.

2. Moreover, the City has made no showing here that any aspect of that plan, as adopted in May 1986, was unnecessary to the whole or required to insure the fair sharing of desegregation-related burdens.

3. The City proposes that it, rather than the federal courts, should judge what level of appropriation beyond the constitutional minimum is appropriate. But this unprecedented suggestion defies any logic. Here, as the Court of Appeals noted, the City failed to object to any specific aspect of the YBE's plan. Nor did it advocate a mandatory plan below. The YBE presented a comprehensive proposal with many inter-linked components. The Ci-

ty would have this Court find that it has the constitutional authority, as a joint tort-feasor, to pick and choose what aspects of this plan should be implemented. Rarely has such a baseless argument been advanced, particularly where the City never told the district court of any element of the YBE's proposal to which it objected or why.

In justifying its position, the City suggests that "by making expenditures beyond the constitutionally-required minimum, local authorities have demonstrated their good faith willingness to comply with constitutional obligations." Nonsense. Here, Yonkers was ordered to fund a desegregation remedy to cure unconstitutional conditions it helped cause. It deserves absolutely no credit for its begruding compliance with a lawful court order, one, parenthetically that the City sought a stay of with no success.

The YBE here has had no windfall; it has expended monies to cure unequal educational opportunities and segregation, as directed by the district court.

In this light, the City's rhetorical arguments should be dismissed and its invitation for judicial review rejected. Moreover, the district court has been careful not to intrude in the general budget-making process between the YBE and the City.

4. There is no conflict whatsoever between *Liddell v. State of Missouri,* 731 F.2d 1294 (8th Cir. 1984) and the Second Circuit's opinion in Yonkers. In *Liddell, supra.,* the Eighth Circuit found that the district court had failed to find certain aspects of the desegregation plan necessary to eliminate the constitutional violation. In *Yonkers,* the Court of Appeals affirmed the district court's conclusion

that the comprehensive desegregation plan included only expenditures necessary for that enterprise.[18]

V. THE INTERNALIZATON OF RACIAL DISCRIMINATION AS ONE AMONG MANY LEGITIMATE POLITICAL INTERESTS IS CONTRARY TO SETTLED LAW AND IS DANGEROUS

This Court has long since determined that state actors may not capitulate to the racial hatred of the mob in making governmental decisions. *Lucas v. Colorado General Assembly, 377 U.S.* 713, 736-37 (1964). No matter how badly the majority may want goverment to practice or promote racial intolerance and segregation, no state actor may succumb to such pressures while respecting the Fourteenth Amendment. *Palmore v. Sidoti, 466 U.S. 429, 433 (1984).* Without this bedrock principle, government could simply respond affirmatively to the discriminatory sentiments of constituents and act to disadvantage, stigmatize and segregate members of minority groups, later arguing that such actions were compelled by the will of the community. A more pernicious doctrine; one more at cross purposes with our constitutional system can hardly be articulated.

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18. In the district court, the parties were asked to specify any areas of disagreement with the YBE's EIP. The district court then held remedy hearings on disputed matters and approved the rest of the board-proposed plan as if it were stipulated to. The City did not make specific objections based on lack of necessity or cost to any particular magnet program or to any renovation deemed needed by school authorities so as to house that program design. In this context, any argument by petitioner that the district court's findings were inadequate is a direct result of its own failure to raise issue with matters in a timely manner, thus leading all other parties and the district court to believe that the City was stipulating to that aspect of the remedy plan.

Yet, it is this doctrine which Yonkers embraces in a desparate effort to get this Court to review its liability here.[19]

1. In so inviting review, Yonkers does not challenge the underlying facts found by both courts below: that residents of white neighborhoods boisterously and persistently opposed the location of any assisted housing for families in three quarters of the city; that city council members, fully apprised as to the racist nature of that opposition, bowed to it and blocked, buried and vetoed numerous otherwise suitable sites for assisted housing in white neighborhoods, intentionally confining all 38 family projects in southwest Yonkers; that City Councilmembers lead this opposition on occasions, playing to it to further their political careers and that strong non-racial reasons disfavored such a concentration. Admitting all these facts, which are painstakingly elaborated upon by the district court, Yonkers submits that the district court made no explicit finding that City officials acted with discriminatory intent.

The Second Circuit soundly rejected this precise argument, 674a-676a, noting that the district court found that "numerous city officials not only responded to,

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19. As previously noted, by signing the Consent Decree of January 28, 1988, Yonkers waived any right to seek further appellate review, including review by this court, of its underlying liability for the construction of 200 units of public housing. This liability clearly relates to the central findings made below—that Yonkers succumbed to racist community sentiment and so excluded all assisted housing from three quarters of its midst. Yonkers now, without as much as mentioning the January 28, 1988 Consent Degree, or its own waiver of appellate rights, as agreed to therein, seeks this Court's review of its underlying liability. This improper request should be rejected on the basis of the Consent Decree alone, as Yonkers voluntarily entered into it after a vote of its City Council, and is bound by its terms.

but. . . .'led the fight against subsidized housing in East Yonkers.' 624 F.Supp. at 1373." The Court of Appeals further chronicled prominent examples of the discriminatory actions of Yonkers political leaders as they agitated and built political careers on the hysterical opposition to assisted housing. 676a.

2. On p. 24 of its Petition, the City attempts to rewrite the findings of fact entered by the district court. The district court found that racial animus was a "significant" factor in local opposition to assisted housing. The City has never challenged this finding as clearly erroneous and it stands as law of the case. On the other hand, the City's contention that there are other, wholly legitimate bases for opposing low income housing finds *no* record support. Indeed, the district court concludes that the assertions of any such "neutral" reasons were merely pretextual, thinly disguising racial animus. So, while numerous apartment houses were constructed throughout East Yonkers, no subsidized low rise could be placed in any such neighborhood.[20]

3. While the City now states that economics, not race, played the "dominant" role in opposition to assisted

20. The City's depiction of East Yonkers as comprised of "single family residential areas" is itself fanciful as there are hundreds of apartment buildings along such streets as Midland Avenue; Bronx River Road; Tuckahoe Road; Yonkers Avenue and Palmer Road, all in East Yonkers. The fact is that when assisted housing was proposed proximate to these apartment buildings, they were defeated as rudely as when they were proposed more proximate to single family residential areas. Moreover, southwest Yonkers contained single family residential areas, but these served as no ground for denying the proponents of assisted apartment houses permits to construct. In short, the City's analysis here seeks to re-try the case, a clearly erroneous enterprise at this stage of the proceedings. *Cf.* 176a, n. 68.

housing in East Yonkers (Petition at 25), it cites to no such finding by the district court. There is no such finding. The district court squarely found that the significant and persistent basis for opposition to assisted housing was "racial" 24a; 174a-178a.

4. Moreover, the district court found, and Yonkers never challenged as clearly erroneous, that the significant racially-motivated opposition to assisted housing in east Yonkers dominated the political process. 178a. Racial animus was not one among a number of factors. Rather it created a highly polarized atmosphere which members of the City Council understood as a make or break factor in their political careers. 81a-88a. Thus, as the district court explained at length east side council members could not support assisted housing in their wards and be re-elected. There was no political compromise inherent in such decision-making, merely domination by the mob.

5. The district court repeatedly found that Yonkers officials acted with racially discriminatory intent in segregating housing for those in need of assistance. Yonkers ignores these numerous passages in continuing to disingenuously submit that the district court somehow forgot to make this finding. Instead, at 174a, the district court specifically concluded that "whatever differences in personnel or program there may have been throughout the years, subsidized housing in Yonkers has been characterized by a common theme: racially influenced opposition to subsidized housing in certain areas of the City, and acquiescence in that opposition by city officials." Again, at 179a, the district court squarely concluded, and Yonkers fails to challenge as clearly erroneous, that "there can be little doubt that with respect to the selection of sites for subsidized housing, appeasement of racially influenced community opposition was an important factor for a very

"significant percentage of those who were responsible for the city's conduct," *United States v. City of Birmingham, supra.*, 538 F.Supp. at 828."

The city is on no firmer ground in asserting before this Court that "there are significant non-racial justifications for the City official's decisions." Petition at 27.

After analyzing the evidence of any such justification, the district court entered entirely contrary findings of fact: "The City has offered various alternative explanations for the pattern of sites approved by City officials, but the exlanations are plausible only if evaluated in the abstract. When applied to the record, none raises any significant doubt about the effect of community opposition on site selection." (emphasis added) (179a).

Moreover, the district court squarely concluded in applying the criteria set out for inferring discriminatory intent in *Village of Arlington Heights v. Metropolitan Housing Development Corporation,* 429 U.S. 252, 264-65 (1977), that "the record reflects repeated disregard of Planning Board objections or recommendations; inconsistent application of stated planning criteria; and, in general, varying degrees of scrutiny depending upon whether the site in question was east or west of the Saw Mill River Parkway." 181a.

In evaluating the conduct of municipal decisionmakers, the court explicitly found that they acceded to community pressure which they knew to be racially motivated, 181a, and led the fight against subsidized housing in East Yonkers in many specific ways and "under circumstances which provide a virtual compendium of the factors that courts have been charged to look for in order to detect the presence of discriminatory intent". *Id.*

And, in the clearest contradiction to the City's current argument that it did not conclude that City officials engaged in invidious discrimination, the district court held: "Having considered the evidence in its entirety, this Court is fully persuaded that the extreme concentration of subsidized housing that exists in Southwest Yonkers today is the result of a pattern and practice of racial discrimination by City officials, pursued in response to constituent pressures to select and support only sites that would preserve existing patterns of segregation." **(emphasis added).**

7. Contrary to the City's argument, in no modern case has the evidence of discriminatory intent been so strong and complete as in Yonkers. In the passages cited above, the district court found that Yonkers officials had intentionally discriminated to create the pattern of housing demonstrated in the record. Indeed, the fact that they discriminated in response to community pressures, while perhaps explanatory of the officials' motives, is legally irrelevant. The governing principle is that officials may not act in an intentionally segregated manner. That the community supports or demands such action does not matter and is no excuse. *Palmore v. Sidoti,* 466 U.S. 429 (1984).

8. In the instant case, the district court examined forty years of governmental decision-making, not the passage of a single referendum, as in *Angell v. Town of Manchester,* 3 EOHC (P-H), #15,398 (D.Conn. 1981). That the district court in *Angell, supra.,* found the evidence of discriminatory intent lacking has no bearing here, where based on overwhelming evidence, the district court reached a contrary conclusion, affirmed in full by the Second Circuit. While the court in *Angell, supra.,* may have found it extremely difficult on the basis of the isolated act under review to ascertain governmental motive, here a review of

thousands of documents; hundreds of incidents and most critically, the testimony of numerous government officials like Alfred del Bello and Dominick Iannocone, who conceded the influence of the racially motivated mob, made this a relatively simple case.

CONCLUSION

The NAACP urges this court to resoundingly and expeditiously deny certiorari, putting an end to the hopes of a hostile, racially motivated mob who continue to resist the guarantee of equal housing rights to racial minorities. With that action, we hope and pray that integration of long barred communities will begin and a process of healing can commence.

Respectfully submitted,

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ATTACHMENT A—FIRST REMEDIAL CONSENT DECREE IN EQUITY

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

-and-

YONKERS BRANCH-NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *ET AL.*,

Plaintiff-Intervenor,

-against-

YONKERS BOARD OF EDUCATION; CITY OF YONKERS; and YONKERS COMMUNITY DEVELOPMENT AGENCY,

Defendants.

---

80 CIV 6761 (LBS)

FIRST REMEDIAL CONSENT DECREE IN EQUITY

The following sets forth certain agreements of the parties to this litigation, and certain actions which the City of Yonkers (the "City") will take in connection with a consensual implementation of Parts IV and VI of this Court's Housing Remedy Order (the "HRO") entered on May 26, 1986. Accordingly, the parties agree as follows:

Public Housing

SECTION 1. The City acknowledges its continuing commitment to the construction of the 200 units of public

housing made available by the United States Department of Housing and Urban Development ("HUD") pursuant to the consent degree of March 19, 1984 between HUD and plaintiff-intervenor.

SECTION 2. The City agrees to provide the sites referred to below in this Section under the caption "Sites" for the location of a total of 200 units of public housing referred to in Section 1. The number of such units to be located on each site is not to exceed the number set forth under the caption "Maximum Density" opposite each site.

Sites	*Maximum Density*
Whitman School (north-west field)	40
Lincoln School (lower field)	48*
School 4	24
Helena Avenue	22
Wrexham Road	30
Clark Street	20
Valentine Street	16

SECTION 3. (a) The City shall have the right to submit no later than ten days after the date of this decree a maximum of two additional sites acceptable to HUD to be used for the location of a portion of the 200 units of Public Housing referred to in Section 1.

(b) If the City avails itself of the right to submit additional sites as set forth in paragraph (a), the City shall also

*If HUD does not approve this proposed density for the Lincoln School site, the densities at other approved sites will be appropriately adjusted.

submit to the Court a proposed amendment to Section 2 hereof, setting forth an expanded list of sites and their respective "Maximum Densities," provided that the Maximum Density of no site shall be fewer than 12 units.

(c) Upon approval by the Court, the proposed amendment to Section 2 shall have the same effect as if fully set forth herein at this time.

(d) The City acknowledges and understands that, if no additional sites are proposed by it and approved by the Court, the 200 units of public housing shall be located on the sites and in the densities currently set forth in Section 2.

SECTION 4. On or before the later of fifteen days from (i) the date of this decree or (ii) the date of any approval by the Court of an amended Section 2 (as contemplated by Section 3(c) hereof), the City shall make (or shall cause to be made) fair market value offers to purchase from their respective owners such private sites as are set forth in Section 2 (as theretofore amended). Such offers shall also advise the respective owners that, in the absence of a voluntary agreement for the purchase by (or on behalf of) the City, the City will commence (or will cause to be commenced) legal proceedings to secure control over the relevant site in the most expeditious manner, including the use of the power of eminent domain.

SECTION 5. On or before 60 days of the date of this decree, the City will have (i) concluded negotiations with, and will have acquired title from, owners of private sites willing to sell their respective properties to the City on mutually agreed upon terms or (ii) commenced eminent domain proceedings against owners of private sites who have been theretofore unwilling voluntarily to sell their respective properties.

SECTION 6. On or before 80 days from the date of this decree, the City shall have caused the Municipal Housing Authority ("MHA") to prepare a request for proposals ("RFP") from developers for the construction of 200 units of Public Housing to be located as provided in Section 2. The parties agree that they will cooperate in good faith with each other, the MHA and HUD to insure that the preliminary steps in the preparation of a final RFP (including (i) the preparation of preliminary site reports for all sites (which shall be prepared at the City's expense subject to reimbursement from HUD, if HUD approves the development proposal), (ii) the subsequent review of such site reports by HUD, (iii) any conferences required to agree on appropriate language for the RFP, and (iv) the drafting of the final RFP) can be completed within the time limitation set forth in this Section.

SECTION 7. (a) On or before the later of (i) 10 days after having acquired site control over all the sites referred to in Section 2 or (ii) the time limitation set forth in Section 6, the City shall cause the MHA to publish at the City's expense the RFP referred to in Section 6 in a manner reasonably calculated to insure that the RFP is broadly disseminated to developers doing business in the Yonkers area. The methods of publication shall include (without limitation) advertisements in *The New York Times* and another newspaper of general circulation in the Yonkers area, direct mailings to specific developers, and periodic advertisements in no fewer than two trade magazines identified by the OHA, and shall otherwise conform to HUD Handbook 7417.1 REV-1 (October 1980) ¶ 6-39(b).

(b) The publication referred to in paragraph (a) shall be made at least once each week for two consecutive weeks.

SECTION 8. The review of developers' proposals shall begin 55 days after the date on which the RFP is first published. The MHA shall complete such review within 20 days and submit its selection to HUD immediately thereafter for HUD's review according to HUD's procedures. Construction shall begin as promptly as practicable following HUD's approval of the development proposal.*

SECTION 9. The City will fully and in good faith cooperate with all persons, parties, and organizations the involvement of which is necessary or desirable for the completion of the process contemplated hereinabove.

SECTION 10. The City agrees that, to the extent it relates to the City's obligation to provide sites for the placement of 200 units of public housing, it will seek no further appellate review of the decision of this Court entitled *United States of America et al. v. Yonkers Board of Education et al.*, 624 F.Supp. 1276 (S.D.N.Y. 1985) or of any subsequently entered decree. The City acknowledges that if any subsequent appellate ruling (whether such ruling had been prosecuted by the City or any other party to this litigation) were to nullify or in any way weaken the constitutional or statutory basis of the City's obligation to provide such sites (as found by the Court in the opinion above), the City would, nevertheless, be required by this Decree on Consent fully to discharge such obligations as set forth herein.

SECTION 11. The parties acknowledge that HUD has not heretofore given its final approval for the sites and densities set forth in Section 2 or for any final develop-

*The parties acknowledge that HUD's processing time for such approval is 50 days. The parties understand that HUD will expedite the approval process if possible.

ment plans for such sites and that, in accordance with the Consent Decree dated March 19, 1984, HUD may disapprove specific proposals that fail to meet applicable standards for approval.

Assisted Housing

SECTION 12. The City acknowledges that a long-term goal (the "Goal") of 800 units of assisted housing (the "Units") is an appropriate target in fulfilling its obligations pursuant to Part VI of the HRO. The City will, subject to the terms hereof, make good faith efforts to take such steps as are required to achieve said Goal on or before June 30, 1992 and to achieve benchmarks of 200, 400, and 600 Units on or before the first, second, and third anniversaries, respectively, of the adoption of Mandated Incentives (as contemplated in Section 17).

SECTION 13. (a) There shall be a presumption in favor of allowing two years for the Mandated Incentives to demonstrate their effectiveness in fostering the development of a sufficient number of Units timely to achieve the Goal without the adoption of additional remedial measures.

(b) Notwithstanding paragraph (a), after the first anniversary of the adoption of Mandated Incentives, plaintiff or plaintiff-intervenor may move the Court for an order directing the City to take additional remedial measures if the movant satisfies the burden of overcoming the presumption referred to in paragraph (a) by clear and convincing evidence that the Mandated Incentives are insufficient timely to achieve the Goal.

(c) If, on or after the second anniversary of the adoption of Mandated Incentives (or at such earlier date as pro-

vided in paragraph (b)), the 400-Unit benchmark referred to in Section 12 has not been met, the plaintiff or the plaintiff-intervenor may apply to this Court for an order requiring the City to adopt additional or substituted remedial measures to insure that the Goal will be timely met.

(d) The City acknowledges that the additional or substituted remedial measures which the Court may require it to adopt as provided herein may include the requirement that the City issue (or cause to be issued) RFPs for the construction of multi-family housing (to include Units) on city-owned land. The City acknowledges further that it would be within the power and jurisdiction of the Court to require such use of city-owned land.

SECTION 14. The parties agree that the Units shall be provided only in conjunction with, or as a part of, housing developments containing units to be offered for sale or rental at market rates.

SECTION 15. The parties agree that, pursuant to Section 12, no fewer than (a) 100 Units shall be provided on terms affordable to families earning no more than 50 percent of the median income in the New York Metropolitan Area; (b) 300 Units shall be provided on terms affordable to families earning no more than 80 percent of the median income in such Area; (c) 300 Units shall be provided on terms affordable to families earning no more than 100 percent of the median income in such Area; and (d) 100 Units shall be provided on terms affordable to families earning no more than 120 percent of the median income in such Area.

SECTION 16. This decree shall impose on the City no obligation with respect to city-owned property, except as

contemplated by Sections 2 and 13 and previously issued orders of this Court.

SECTION 17. The City agrees to adopt, among other things, legislation (a) conditioning the construction of all multi-family housing (inclusive of projects for future construction currently in the planning stage but which will require zoning changes, variances, special exceptions, or other discretionary approvals from the City to begin construction) on the inclusion of at least 20 percent assisted units; (b) granting necessary tax abatements to housing developments constructed under the terms of the legislation referred to in clause (a); (c) granting density bonuses to such developers; (d) providing for zoning changes to allow the placement of such developments, provided, however, that such changes are not substantially inconsistent with the character of the area; and (e) other provisions upon which the parties may subsequently agree (including the use of the Industrial Development Authority as a development vehicle and the creation of a municipally-designated, independent not-for-profit Local Development Corporation) (collectively, the "Mandated Incentives"). The City agrees to implement a package of Mandated Incentives as promptly as practicable but, in no event, later than 90 days after the entry of this decree.

SECTION 18. (a) The parties acknowledge that certain issues remain to be agreed upon. These issues include, without limitation, the appropriate percentage configuration (as between assisted- and market-rate units) of the relevant housing developments; the appropriate share of Units devoted to rental or to ownership; the appropriate resale limitations for Units allocated to ownership; the implementation of other financial mechanisms to facilitate the provision of Units or to make them more widely affordable; the appropriate disposition of such funds as are

deposited in the AHTF; the steps which the City may take to make the use of "section 8 certificates" more widely available; and the possibility of a reduction in the Units to be made available at prices affordable by the income groups referred to in clauses (b) and (c) of Section 15 if the City were to secure the placement of units of assisted housing in certain housing developments currently under consideration in the City.

(b) The parties agree that they will work diligently to agree on such subsidiary issues and submit to the Court on or before February 15, 1988 a Second Remedial Consent Decree setting forth any understandings with respect to such matters.

SECTION 19. If in the view of any party there exists a problem or obstacle to the full or timely implementation of this decree, any party may bring such issue before this Court for resolution.

SECTION 20. Plaintiff-intervenor or the City may assert before this Court such rights it may have to challenge the discretionary decisions which HUD may make in making available the 200 units of public housing which are the subject of this decree, including any decision not to waive the Total Development Cost cap.

Dated: January 25, 1988

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SO ORDERED:
s/ Leonard B. Sand
Leonard B. Sand, U.S.D.J.
Dated: January 28, 1988

Supreme Court, U.S.
FILED
MAY 27 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 87-1632

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

YONKERS BOARD OF EDUCATION
Petitioner

v.

UNITED STATES OF AMERICA AND
YONKERS BRANCH-NATIONAL ASSOCIATION
FOR THE ADVANCEMENT OF COLORED PEOPLE, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONER'S REPLY BRIEF

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

No. 87-1632

YONKERS BOARD OF EDUCATION,
Petitioner

v.

UNITED STATES OF AMERICA, and
YONKERS BRANCH-NAACP,
Respondents.

REPLY BRIEF OF PETITIONER YONKERS BOARD OF EDUCATION

I.

If the United States is unwilling to endorse the District Court's *legal rationale* for holding the Yonkers Board of Education liable for system-wide school segregation, it should be required to say so. Instead, this reluctant administration continues, as it did before the Court of Appeals, to run and hide behind the existence of discrete "factual findings" that the District Court itself conceded were not sufficient to render the school authorities liable for system-wide segregation.

The issue of "[t]he legal relevance of public housing discrimination to school segregation . . .," App. at 497a, is not one that the Board simply contrived to appeal a decision whose holding, as the United States would have it, rests on some other, fact-specific footing of intentional wrongdoing by school officials. (U.S. Br. at 9.) It is the District Court itself which expressly concluded that "the existence of subsidized housing discrimination in Yonkers *must be accorded legal relevance* in determining whether *school authorities* may be held legally accountable for the segregation of Yonkers public schools." App. at 497a (emphasis added). And it is the District Court, in equally plain

English, which held that "where school officials knowingly adhere to a segregative student assignment policy" — i.e., the neighborhood school policy in widespread use throughout most of the country[1] — "which is consistent with city officials' unlawfully segregative conduct in housing, such a policy cannot, *as a legal matter*, be considered race-neutral." *Ibid.* (emphasis added). Not surprisingly, both the legal and academic communities[2] — as well as the NAACP intervenors in their brief to the Second Circuit[3] — have cited *Yonkers* for precisely this proposition.

Only the United States pretends (for obvious reasons, given the stance of this administration on legal policy questions such as this) that, *without* reference to the issue of housing practices, the District Court in an unexceptional way merely held the school authorities liable for their own actions "on the basis of factual findings." (U.S. Br. at 9.)[4]

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[1]*See, e.g., Keyes* v. *School District No. 1*, 413 U.S. 189, 245-46 (Powell, J., concurring in part and dissenting in part) ("Neighborhood school systems, neutrally administered, reflect the deeply felt desire of citizens for a sense of community in their public education.").

[2]*See Jenkins* v. *Missouri*, 807 F.2d 657, 675, n. 24 (8th Cir. 1986) *(en banc), cert. denied*, 108 S.Ct. 70 (1987) ("On similar facts in *United States* v. *Yonkers Board of Education*, . . . a New York district court imposed an interdistrict remedy based on housing violations."); Days, Book Review, 95 Yale L.J. 1737, 1767 (1986) (Court imposed "liability upon the [Yonkers] *school board* for its failure to take desegregative action to overcome the effects of the city's segregative housing practices, an approach that has been generally eschewed by the courts." (emphasis original.)

[3]Urging affirmance of the District Court's holding against the Board before the Court of Appeals, the NAACP intervenors stated: "[T]he district court properly imputed liability for school segregation to school officials based, in part, upon the segregative housing practices of City officials." Br. of Plaintiffs-Intervenors-Appellees in Court of Appeals at 86.

[4]Significantly, the quotations which the United States employs to summarize the basis of the District Court's holding against the Board are taken almost entirely, not from the District Court opinion, but from that of the Court of Appeals. While the Court of Appeals affirmed the Districts Court's decision "in all respects," App. at 583a, its superficial recitation of the basis of the District Court's holding against the Board is, in many important aspects, both inaccurate and badly overstated.

Indeed, in the hands of the United States, the essence of the District Court's factual findings have simply been turned around. Where the United States asserts that the Board "committed acts of intentional segregation that *caused the racial segregation of its school system*" (U.S. Br. at 11 n. 10) (emphasis added), the District Court itself squarely held, for example, that the "segregated condition of many Southwest Yonkers schools (elementary schools in particular) cannot be similarly traced to affirmative, intentionally segregative changes in attendance zones or student assignment decisions." App. at 485a. Where the United States purports to rely on "the *extensive* factual findings . . . which highlight" the Board's "segregative intent" (U.S. Br. at 11) (emphasis added), the District Court's explicit conclusion was that — taken as a whole — "the record contains substantially less (or no) evidence of many of the classic segregative student assignment techniques . . .." App. at 497a.

Moreover, the District Court noted that it was precisely the *absence* of such record evidence in any significant degree which makes this case "factually distinguishable" from those in which other lower courts have held unconstitutional neighborhood school policies "where discriminatory housing practices had contributed to the racial segregation of the neighborhoods." App. at 497a, 495a (citing *Arthur* v. *Nyquist,* 415 F.Supp. 904 at 968-969 (W.D. N.Y. 1976), *aff'd in part,* 573 F.2d 134 (2d Cir. 1978), *cert. denied,* 439 U.S. 860 (1978); *United States* v. *Texas Education Agency,* 467 F.2d 848 at 863-64 n. 22 (5th Cir. 1972)). Thus, while the United States states that the existence of a conflict between the decision below and repeated decisions of the Sixth and also the Fourth Circuit is "illusory" (U.S. Br. at 11 n. 10), nowhere does the United States explain why the District Court itself was compelled to acknowledge that its own legal conclusion regarding the relevance of the housing-school connection was in apparent conflict "with a series of Sixth Circuit rulings," App. at 496a, and that "[t]he legal relevance of public housing discrimination to school segregation . . . has not been definitely resolved." App. at 497a.

The District Court's resolution of this issue — by definition, a legal question of enormous policy implications for public education — is the *sine qua non* of the decision below.

II.

The United States does, on the other hand, stress that the District Court "found that the Board and the City *worked together* to maintain the segregation of the Yonkers public schools in a manner that rendered the statutory legal separation between them 'an artificial and constitutionally insignificant one.' " (U.S. Br. at 6, quoting App. at 500a) (emphasis added). To this end, the United States points to the District Court's conclusion that "the combination of the *City's housing policies*, the mayoral appointment of Board members and the subsequent inaction of the Board amounted to an interrelated governmental effort to preserve the integrity of 'neighborhood schools' whose racial segregation was governmentally sanctioned and steadfastly maintained." (U.S. Br. at 8, quoting App. at 500a) (emphasis added).

In this respect, the Court's findings of an "interrelationship" between the actions of the Board and the City, notwithstanding the "independent legal status of the two entities," *see* App. at 517a , depends entirely on the legal significance which the Court attributed to the mayor's exercise of a discretionary appointment power. The decision is devoid of any other basis.[5]

---

[5]The United States misleadingly cites the testimony of a former mayor (testimony not relied on by the District Court) to the effect that "the City and Board worked together on educational matters as 'one family.' " (U.S. Br. at 8, n. 5). In fact, this testimony referred only to a collaborative effort between the two entities to identify potential and feasible school sites — precisely as New York state law contemplates. Tr. 1251-52.

Nor, contrary to the government's assertion, did the Court make *any* finding that the Board's delayed return of the closed School 4 property for disposition constituted a "[d]eparture from the normal procedural sequence" of *Board* actions. (U.S. Br. at 7, n. 7.) While the Court did made such a finding with respect to the actions of the City in assuring the use of the School 4 site for "luxury-type housing," it made no such finding with respect to the Board's intent. Indeed, the Board's refusal to return the school site to the City was entirely consistent with its identical refusal to return *three other* closed school

Footnote continued on next page

Thus, contrary to plaintiffs' contentions below, the Court could *not* find that either the City Council's budgetary authority *or* the City's statutory involvement with school site selections was "generally accompanied by racially segregative consequences to Yonkers public schools." App. at 521a-22a. Nor could the Court find *any* evidence that Board members permitted themselves to be "dominated" or "controlled" during their terms of office by either the mayor or other City officials. App. at 517a-18a. Indeed, despite the government's assertion that the Board and City "worked together" to maintain school segregation, the District Court expressly found that, on every occasion, the Board *rejected* City requests for school attendance line changes that would have had a segregative effect.[6] App. at 465a-66a. This "consistent refusal" by the Board to implement City-proposed attendance zone changes with a potentially segregative impact, App. at 467a, was, of course, entirely consistent with many of the Court's other findings of "*desegregative* initiatives" by the Board: the closing of the District's only predominately black school in 1954 (three months before *Brown*) and the reassignment of its students to two predominately white schools; the planned openings of new elementary schools in the late 1960s and early 1970s with the intent to *improve* significantly racial balance in the Southwest Yonkers public schools; the conscious attempts "to effectuate modest improvements in racial imbalance" in the context of fiscally-motivated school closings in 1976; and affirmative and aggressive efforts beginning in the late 1960s to recruit minority teachers. *See* App. at 260a, 234a, 242a, 274a, 356a-57a.

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sites to the City during the same period of time, two of which (Schools 3 and 12) were located in *west* Yonkers and none of which was the subject of pending housing proposals.

[6]Similarly, while the City Council has traditionally passed resolutions on a "variety of school-related issues, such as the addition, site selection, construction, opening, closing, and redistricting of schools, the need to arrange bus transportation for students in particular areas, and the timing of Board decision-making," App. at 467a, the Court found that such resolutions "have been given little or no serious consideration by the Board or have been specifically rejected." App. at 468a.

In short, the Court's conclusion of a segregative "interrelationship" between the Board and the City hinges *solely* on the mayoral appointment — as delegated by operation of state law — of Board members who favored adherence to the Board's long-standing neighborhood school policy.[7] The United States simply characterizes the Board's adherence to such a policy as the equivalent of "avoiding desegregation." (U.S. Br. at 6.) The District Court, for its part, similarly regarded the Board's adherence to neighborhood schools as "a segregative student assignment policy which is consistent with city officials' unlawfully segregative conduct in housing [which as such] cannot, as a legal matter, be considered race-neutral." App. at 499a. Yet Congress itself has reflected the Board's identical policy preference for adherence to the neighborhood school system. 20 U.S.C. § 1701.

Finally, whatever inference may be drawn from the *mayor's* intent in appointing to the Board proponents of the neighborhood school system — an extremely sensitive and problematic inquiry at best[8] — the issue, in the last analysis, is whether the *Board* independently was under any legal duty to adopt a desegregation plan and dismantle its traditional neighborhood school system.

In the absence of findings that the Board had committed a "significant number of affirmative acts of intentional segregation in the area of student assignments . . .," App. at 491a-92a, *or* that it had attempted to enhance within the school system the effects

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[7]Contrary to the Court of Appeals' conclusory assertion that the Board's adherence to this policy was "selective," the "consistent element being that deviations [from and] manipulations [of the policy] tended to increase the racial imbalance in the schools" (App. at 689a; *see* U.S. Br. at 9-10), the District Court expressly found that, especially at the elementary level, the Board's adherence to the neighborhood school policy "has generally been consistent." App. at 218a. The Court of Appeals was not free to disregard findings such as this except by application, which it did not employ, of the clearly erroneous standard. The Second Circuit's treatment of the attendance line change between Schools 9 and 12 (App. at 623a-24a) similarly purports to summarize a "finding" which the District Court nowhere made. *See* App. at 227a-28a.

[8]*See Mayor* v. *Educational Equality League*, 415 U.S. 605, 615 (1974).

of existing residential segregation, *or* that it had "worked together" with City officials in accepting proposals for segregative attendance line or other changes, the answer, as a matter of law, is that it was under no such duty. *See, e.g., Dayton Board of Education* v. *Brinkman,* 433 U.S. 406, 414 (1977) (refusal to proceed with remedial desegregative measures not a constitutional violation unless school board, based on prior unconstitutional acts, was under a duty to take such action in the first place); *Washington* v. *Seattle School District No. 1,* 458 U.S. 457, 479-80 (1982).

III.

The United States concedes that in considering whether a school system is racially segregated, it is permissible to group together blacks and hispanics — or other minorities — only where there is evidence that "the *school board* [has] discriminated against both groups of students." (U.S. Br. at 12) (emphasis added). This is the indispensible prerequisite under *Keyes* v. *School District No. 1,* 413 U.S. 189, 196-198 (1973).

The opinions of both lower courts fail this test entirely. There are, to repeat, no findings by the District Court, and no record evidence, that *school authorities* in Yonkers discriminated against hispanics.[9] Thus, this is not a proper case, as the government urges, for application of the "two-court rule." (U.S. Br. at 13, citing *Graver Mfg.* v. *Linde Co.,* 336 U.S. 271, 275 (1949)). The issues "of general importance considered here are not contingent upon resolving conflicting testimony," since there are no concurrent findings by the courts below regarding discrimination against

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[9]Indeed, the District Court expressly determined that the Board's vocational admissions practices, for instance, did *not* have a discriminatory impact on hispanics. App. at 329a n. 113 (Hispanics "not similarly represented in disproportionately low numbers."). Moreover, while the government points to the statement of the Court of Appeals that the record includes "evidence of hostility to Hispanics as well as blacks," (U.S. Br. at 12), that reference is wholly unrelated to evidence of *school board* discrimination against hispanics. *See* App. 684a.

hispanics in the school system. *See A. & P. Tea Company* v. *Supermarket Corp.*, 340 U.S. 147, 153 (1950).

In sum, the record is no more devoid, as the government concedes, of "evidence of discrimination against Asians in the Yonkers school system" (U.S. Br. at 12-13, n. 11), than it is of evidence of discrimination against hispanics in the same school system. On this issue, the United States has all but abandoned the field.

CONCLUSION

In this case, a school board which has not engaged in "a significant number of affirmative acts of intentional segregation in the area of student assignments" — a school board which, indeed, has taken numerous *integrative* steps — has nevertheless been held liable for systemwide school segregation. The links which made this holding possible, segregated residential patterns and the differing judicial treatment of various minority groups, are issues of national concern.

The Board of Education's petition for a writ of certiorari should be granted.

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Dated: May 27, 1988